

S. HRG. 108-810

# INVESTIGATION INTO THE BUREAU OF RECLAMATION'S ANIMAS-LA PLATA PROJECT

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## HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS UNITED STATES SENATE ONE HUNDRED EIGHTH CONGRESS SECOND SESSION

**SPECIAL HEARING**  
MARCH 24, 2004—WASHINGTON, DC

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# **INVESTIGATION INTO THE BUREAU OF RECLAMATION'S ANIMAS-LA PLATA PROJECT**

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**WEDNESDAY, MARCH 24, 2004**

U.S. SENATE,  
SUBCOMMITTEE ON ENERGY AND WATER DEVELOPMENT,  
COMMITTEE ON APPROPRIATIONS,  
*Washington, DC.*

The subcommittee met at 10:03 a.m., in room SD-124, Dirksen Senate Office Building, Hon. Pete V. Domenici (chairman) presiding.

Present: Senators Domenici and Campbell.

## **DEPARTMENT OF THE INTERIOR**

**STATEMENT OF BENNETT W. RALEY, ASSISTANT SECRETARY, WATER  
AND SCIENCE**

### **ACCOMPANIED BY:**

**WILLIAM E. RINNE, DEPUTY COMMISSIONER/DIRECTOR OF OPER-  
ATIONS**

**RICK EHAT, PROJECT CONSTRUCTION ENGINEER**

### **OPENING STATEMENT OF SENATOR PETE V. DOMENICI**

Senator DOMENICI. First let me welcome the witnesses and thank you all for making time to participate in this hearing. I would also like to thank all the parties for the courtesy and professionalism that they have shown my staff in preparing for this hearing. It is my intent that this hearing examine the issues relative to Animas-La Plata, specifically the increase to the estimated cost project that were revealed last year. Let me begin then.

We in the West are facing great challenges when it comes to available water supply. The Bureau knows that. If they do not they should. The current drought makes this challenge even more daunting at the same time our country faces other great challenges; reducing the debt, sustaining economic prosperity and protecting our environment. All these forces are brought to bear on large infrastructure projects such as this one. I think that all of us in this room understand the importance of providing sustainable water to the arid regions of the country. But we also understand that this must be balanced with environmental-sensitive and good economic stewardship.

Let me start off by saying that I am committed to the construction of ALP. I prudently believe that the Animas-La Plata Project is important and I join with Senator Campbell, who has been the principal leader—Hi, Senator Campbell—because this project is im-

portant to the West for numerous reasons. Being able to store available water is a critical element in providing a reliable supply of water to the western United States for there is usually not a reliable flow of sufficient water in streams, rivers to meet needs. This project is crucial to providing a degree of certainty to all the interests who depend on reliable water supply, whether they are agricultural or environmental. This certainty in turn fosters long-term economic health necessary to continue a way of life. The Animas-La Plata Project is also somewhat unique in that it serves as a central mechanism to settlement once and for all of long-disputed tribal rights in the Four Corners area. In fact, like it or not, in many ways this project is being looked at as the vanguard when it comes to settlement mechanism, and as such it is being highly scrutinized through the western United States. I do not think I have spoken to anyone who deals with water in the West who has not heard of the Animas-La Plata Project. Having said that, I will get to the issue of today's hearing.

Regardless of how important this project is we cannot proceed with the idea that it will be completed at any cost. That will not work. We cannot continue down the path that is perceived as carte blanche expenditures of Federal tax dollars. This project, like every other project in which the Federal Government participates, must be managed such that the taxpayers get the best return on their money. The American taxpayer must have confidence in the Federal projects in that they are being implemented in a fair and reasonable manner for a fair and reasonable price. We here in Congress are responsible for making the decision to go forward with these projects based on information and analysis that you provide us. This cannot be taken lightly. The Congress must have confidence that their decisions are being based on complete and accurate information and when the Federal Government says that a project is going to cost  $x$  number of dollars the taxpayer must have confidence that when we in fact execute the project that we will do that for that amount. I was astounded to learn that last fall, of the \$162 million increase in the cost estimate of this project. Now I know that it is not unusual for projects to creep up in price once they get underway, but 50 percent increase, from \$338 to \$500 million for me is unacceptable. The task at hand, and it starts today, is make sure that this never, never happens again. I understand from the report to the Secretary that there are several contributing factors to the grossly underestimated cost and I hope to examine these today. If I run out of time we will get you to give us the answers and if we have to we will call you back. But more important, a mutual understanding of what will be done to prevent this incident from happening again is terribly important.

I would like to welcome Mr. Bennett Raley, Assistant Secretary of the Department of the Interior for Water and Science. We welcome you and thank you for coming. Accompanying him is Mr. Bill Rinne. Is that how you say your name?

Mr. RINNE. Rinne, Rinne, sir.

Senator DOMENICI. Rinne. Who is with us today to provide the subcommittee with an overview of the 638 Contracting process. Sixty-eight refers to Indian Self Determination and Education Assistance Act. Senator Campbell and I are fully aware of that Act.

We certainly did not promote it with the idea that it would be the cost of such overruns as this, if that is the case. I am not sure it is but my friend, Senator Campbell is nodding, and if it is that is not what we intended. So when 638 refers to Self Determination and authority utilized for all aspects of Animas-La Plata. It will be part of the first panel and I will begin by having Mr. Raley do his opening statement after I let Senator Campbell talk. And then if we could have your 638 specialist provide us an overview we will begin on questions and I would appreciate it if you would give us frank answers and that you not fear telling us if it is 638 that is not working, tell us.

Our second panel we have a host of witnesses representing both the non-Federal sponsors, local water authorities, tribes that are party to the project. We appreciate you all taking time to be with us.

With that, Senator Campbell, would you care to make your opening remarks?

#### STATEMENT OF SENATOR BEN NIGHTHORSE CAMPBELL

Senator CAMPBELL. Thank you, Mr. Chairman. First, I'd like to, with your permission, submit for the record a statement from Senator Allard, who could not be here this morning. If that would be all right? And second, I have to chair another hearing at 11:00 so I am going to stay as long as I can but I do have all of the testimony in writing here that I will read at length.

Senator DOMENICI. Senator, I intend to come to your hearing so we are going to break here in time.

Senator CAMPBELL. Thank you, thank you.

Senator DOMENICI. If you will make sure that you say there that I am late and I am coming.

Senator CAMPBELL. Yes, I will, thanks. We will have a vote in the middle of that hearing, as you know, but we will keep that going.

As you know, Mr. Chairman, the Animas-La Plata is very important to southwestern Colorado and the northwest part of your State too, and it was an effort that you and I both worked on for a number of years. This was originally authorized, I don't think a lot of people know it, but was authorized clear back in the 1950's when Congressman Wayne Aspenall from western Colorado was in the House as the Chairman of the Interior Committee. It was authorized at the same time as the Central Arizona Project in the Central Utah Project, and never was built. And for years, since I first came to Congress, I have worked on this but the fight even goes back farther than that, clear back to 1868 when the Ute tribe signed a treaty with the United States that was never honored. And of course, as we both know in the history of the United States government, when dealing with Indian tribes most of them were never honored, unfortunately. But the Colorado Ute Indian Water Rights Settlement Act, as it was called, of 1988 was the bill that I first introduced when I came to Congress 18 years ago to try to move the project again. And as I leave the Senate my goal certainly is to make sure that this project is on-line with no further unexpected bumps in the road.

I am just as concerned as you are about the size of the cost overrun. The revised estimates increased the cost of over \$162 million, as you have mentioned. That is a lot of money. And I am the last person who wants to spend more Federal money on unexpected cost overruns. But this is certainly unexpected for all of us. I was astounded when I was told by Secretary Norton that there was a cost overrun. But it is the United States' honoring of a treaty that was signed in 1868. I think we need to look at that foremost. And also, we need to look at why these overruns have occurred to make sure that there is no additional cost to be incurred by the project in the future, as you have already mentioned. I know there has been some discussion about whether the 638 Contracting is largely to blame for the overruns. After examining the numbers as closely as I can I do not think there is a basis for that claim. While there are some additional costs associated with tribal contracting, some additional costs were envisioned by the Self Determination Act and the 638 costs on the Animas-La Plata contract are well within the normal range. Part of the problem, in my view, is that there is a lot of confusion about what 638 Contracting is and is not. The Self Determination Act allows certain Federal agencies to contract with Indian tribes to conduct government programs or build Federal projects that are intended to serve Indian people. The act is intended to benefit tribes by permitting them to obtain the experience necessary to compete in today's complex business and governmental world. The Act also recognizes that active tribal participation in programs and projects to serve Indian people will result in a product that is more likely to meet the needs of the tribes and tribal members. What 638 Contract is not, however, is a blank check to tribal organizations to build a project no matter what it costs. And you have certainly spoken to that. These contracts are very carefully negotiated, there are extensive scoping sessions, determinations of fair and reasonable prices, partnering agreements, secretarial revisions of plans based on tribal concerns and many other procedures to ensure that the government is not blind-sided by unexpected costs. And I want to make one thing very clear. The increases caused by these cost overruns should not and will not be passed on to local water users. The local water users did not know that there would be cost overruns and I think it would be unfair to have them have to pick up the slack.

PREPARED STATEMENT OF SENATOR WAYNE ALLARD

Thank you, Mr. Chairman, I am looking forward to the testimony as long as I can stay.

Senator DOMENICI. Senator Allard's statement will be inserted for the record.

[The statement follows:]

PREPARED STATEMENT OF SENATOR WAYNE ALLARD

Thank you, Mr. Chairman, for allowing this statement to be presented before the committee. After listening to the testimonies presented today, it will become quite evident that the history of the Animas-La Plata project has been one of compromise and challenge. The witnesses gathered today have spent decades working toward the fulfillment of this project, including my colleague, Senator Ben Nighthorse Campbell.

Growing up in rural Colorado and throughout my tenure as a public servant, the Animas-La Plata conflict endured. In fact, it continued for more than three decades until the authorizing amendment passed in 2000. Until that point, every time water and water projects were discussed, the promises and unsettled claims to the Colorado Ute Indian Tribes persisted. Today, 4 years after the historic agreement of 2000, the Federal Government is fulfilling its obligation to the Ute Indian Tribes and to satisfy the water treaty obligations. Dirt is finally moving and the reality of a promise fulfilled is beginning to take shape.

I would like personally to commend Senator Campbell for his tireless efforts from his days in the House of Representatives to his current time in the Senate and through four different presidential administrations to fulfill our Nation's treaty obligations.

The current situation, indeed the reason for this hearing, has caused a moment for responsible reflection. I am concerned, as is everyone here, about the cost overruns. I also realize that we are all here today to assure that future projects learn from ALP. However, I would reiterate to the Committee that there remains strong support for this project from citizens and locally elected officials. I have no doubt that the issues brought forward today will build a stronger partnership between the Bureau and all Section 638 partners. It took 130 years for Congress and the administration to recognize the responsibility to build the project. I will continue to support the efforts of local partners and the efforts of Senator Campbell today, through completion of the project, and long after.

Thank you Mr. Chairman.

Senator DOMENICI. Senator Campbell, let me say, while I have joined you along the way from the original down to Animas-La Plata right to this day, I am sorry we will not have you around for a longer period of time. But I hope that during the ensuing months before you leave us that you will join in making sure, with me and others, that we can finish it in a reasonable manner. And a reasonable manner does not mean these kinds of overruns or we will end the project in the middle. And that is what will happen.

Now with that I want to start. Secretary Raley, would you please give us your statement? Brief it. It will be made a part of the record at this point.

#### STATEMENT OF BENNETT W. RALEY

Mr. RALEY. Thank you, Mr. Chairman, Senator Campbell. I want to thank you for this opportunity, and I mean that very seriously. My presence here today is simply a function and a reflection of the seriousness with which Secretary Norton and myself and the Commissioner take the construction cost estimate increase. We were horrified, as you are, to find it out, that it existed. And Secretary Norton directed, immediately, that there be an exhaustive review of the reasons. We're here today to report on those reasons. But I want to harken back to your comments before the hearing started, Mr. Chairman. You said, well, come up and shake hands while we start friends. I know we'll end friends, Senator, because friends have the obligation to be honest with one another. We will be honest with you and we will be honest with the public with respect to what happened here. We will depart friends because we share the same goals, protecting the public interest and moving forward with the Animas-La Plata Project in fulfillment of the United States' obligations to the tribes, once, finally we hope.

With me today are Bill Rinne, Deputy Commissioner of Reclamation and Rick Ehat, Project Construction Engineer. Mr. Rinne, in fact, was tasked by the Commissioner, having not had involvement in the Animas-La Plata Project, to assemble a team within Reclamation of individuals that had not been directly involved in the

Animas-La Plata Project, to do a review on lessons learned. Mr. Ehat, as you know, is the man on the ground, on the point to help us fulfill our obligations to you and the public. Senators, Mr. Chairman, these two gentlemen have my trust and I hope that they will earn yours.

We're here today to discuss what the Department has learned from the Animas-La Plata experience. More importantly, we're here to discuss what the Department and Reclamation have done and will do in order to assure both you and the public that the Animas-La Plata and future Reclamation projects will be constructed in a cost-effective manner based on the best information available. As I said before, I want to assure you that the Secretary, myself and the Commissioner were deeply disturbed when we found out that the cost of completion of the Animas-La Plata Project was approximately \$500 million, in today's dollars, instead of the \$338 million we all previously thought. And in fact I will assure you, Mr. Chairman and members of this committee, that the questions internally have been far more pointed and far less tactful than are likely to ever emanate from this committee, given the conduct of the Senate.

The Secretary immediately directed Reclamation to take three steps: find out what happened to Animas-La Plata; find out what can be done to fix this problem and review other Reclamation construction projects to see if similar problems exist elsewhere in Reclamation. From an analytical standpoint there were at least fundamental causal factors for the increase in the construction cost estimate. First, and let me be very clear about this, there were management failures by Reclamation in the management and implementation of this project. There were ample opportunities, both pre- and post-authorization, to fully analyze the cost estimate for ALP. I would add that there are other factors that may have contributed to the unhappy result that we face today, but my purpose here today is to focus on the Department's responsibility and Reclamation's responsibility for what happened and our ability to ensure, as you said, Mr. Chairman, that it never happens again.

The first that I would mention is, due to the organizational changes, from 1993 to 1995, and I'm not suggesting a disagreement or, for that matter, agreement with those changes; they simply were and are what they are; the processes that had been in place, developed over decades for construction management, if you will, were sunsetted. In particular, the Reclamation instructions that had been built over the years to deal with complex construction projects were sunsetted effectively in 1995. In retrospect, and again, I am not distracting attention from or suggesting that this was the dominant reason; I started out by referring to Reclamation's responsibility in the construction cost estimate increase and do not flinch from that. But we also must recognize, if we are to address this in the future, in retrospect it has become clear to us that what happened was in essence the wiring was ripped out and not replaced with anything in a systemic way. We know that now, we know that too late to avoid what happened at Animas-La Plata. What happened in the interim was that the wiring was put in place in an ad hoc and incomplete manner. And if it weren't for the fact that this happened at Animas-La Plata, quite frankly, it was a function that was, it was a result that was bound to happen un-

less and until the discipline and control and reporting functions to the public and Congress were replaced. And we recreate at a different level what was sunsetted with the Reclamation instruction.

Finally, Reclamation, and perhaps others, lacked an adequate understanding of the cost differences, notice I say cost differences, of contracting under the Indian Self Determination and Education Assistance Act, or 638 as it's commonly referred to, versus traditional Reclamation contracting.

Let me respond explicitly and without ambiguity to questions that have been raised by yourself, Mr. Chairman, and Senator Campbell. Six-thirty-eight is not the cause of the construction cost estimate increase. The cause was, with respect to 638, a lack of understanding in the Bureau and elsewhere as to the differences between 638 and what Reclamation traditionally does. If there's been a misunderstanding of the Department's perception as to the factor that 638 plays in this, either on the Hill or with our partners in the tribes, I apologize for that. But it is the position of the Secretary and myself that 638 is not the cause of the increase. It was our lack of comprehension of the differences. And we are comfortable that 638, with what we know now, can be implemented throughout the Animas-La Plata Project and other projects in a way that fulfills the requirements and goals of that Act and also achieves the goals of protecting the public interest.

Now, these causal factors represented themselves in what I would call symptoms. Among those symptoms include a dependence on appraisal level information as if it was a feasibility or higher level of certainty with respect to cost estimates. That was a fundamental error, the Bureau played a significant role in that. But the fact of the matter is that what was treated as feasibility-level work was in fact far less than that; it was appraisal-level work. And that was a symptom of the causal factors I've referred to.

Another symptom, mischaracterizations. Not to my knowledge intentional, but omissions that were very serious of site conditions. To be blunt there was an assumption that the site for the pumping plant was soil and in fact it is bedrock. There's a significant difference in cost for excavating that site. That was a management failure to not understand that. There was a failure to fully factor in the cost impacts of environmental and other constraints. Throughout the process there were costs associated with changes in site locations that were not adequately discussed with our partners or with you. There were omissions of costs in the 1999 estimate. There was, fundamentally, an inadequate review, in Reclamation, of the draft cost estimates that were relied upon by Congress. There was also and has been in the months since the discovery of the increase an inappropriate characterization by Reclamation personnel, inadvertent, I know, of the role that 638 played in the cost increase. I said, without reservation, that 638 is not the cause of the cost increase, that it was—

Senator DOMENICI. Has the Bureau ever had big contracts under 638?

Mr. RALEY. Not to my knowledge, sir. And the experience, the institutional knowledge within the Bureau, let me put it this way, it's far greater now than it was as Animas-La Plata was going through the process. That is something that the look back has identified as

a critical need and in fact the Bureau of Reclamation has reached out to other resources in the Department, at the BIA and elsewhere, where they have a longer and deeper history of working with 638, so that the misunderstandings and mistaken assumptions that were present in Animas-La Plata are not repeated.

As I indicated, Secretary Norton has directed that there be a multi-level response or a review and assessment. In response to that, Reclamation has created a new organizational structure which clearly lays out the responsibility for project construction. Reclamation has doubled its efforts to consult with project sponsors on the scheduling of construction activities and reviewing design changes to save costs at every opportunity. Reclamation is tracking, on an on-going basis, the actual costs incurred against the overall 2003 construction estimate, something that was not previously done. We're providing this information to project sponsors and the general public on a monthly basis. Reclamation is reviewing its procedures for cost estimates and construction to identify and correct process deficiencies that may have led to the ALP cost estimate problems. In essence, we need to rewire in a more effective manner what was taken away with the sunseting of the Reclamation instructions.

Senator DOMENICI. Now, you say rewire, you're using that as an analogy, right?

Mr. RALEY. Yes sir. There were very elaborate, some would say too elaborate, Reclamation instructions that in essence provided the discipline and structure for the management of projects starting with engagement of Congress moving forward to completion. With the sunseting of the Reclamation instructions for a wide range of reasons, what we realize now and didn't know until we thought about it, was that much of the discipline, much of the reporting and the identification of who's responsible for what, where the buck stops for particular decisions was swept away and only replaced on an ad hoc basis. That was a management failure within Interior. Reclamation, as I said, has reached out to other resources to fully understand 638. And finally, Reclamation and the Department are engaged in a long-term process that's intended to enable Reclamation to fulfill its core mission of delivering water and power in a manner from Reclamation facilities that achieves the goals set by Congress and our responsibility to the public. One of the most important parts of this process is an effort to identify the human capital and institutional structures that need to be in place so that Reclamation can fulfill its responsibility to you and the public for ensuring that projects like Animas-La Plata are completed in the most cost-effective manner.

In summary, the Department reiterates its support for Animas-La Plata completion and moving on. Reclamation takes responsibility for problems that occurred at Animas-La Plata. Reclamation has implemented measures for controlling costs on Animas-La Plata. Reclamation is actively consulting with project sponsors on all aspects of the project. Reclamation stands behind the 2003 cost estimate of \$500 million plus indexing. Reclamation has streamlined reporting and accountability for construction management. And we're using this as a lessons learned so we avoid this experience in the future.

If I could step back one last time and then turn this over for question from you, Mr. Chairman and Mr. Campbell, in the long-run our perspective is that there's an irreducible minimum function or core concept that Reclamation needs to be able to serve. Reclamation in the next century will inevitably, or Reclamation or its equivalent, will have responsibility for operating and maintaining many of the projects built over the last century. Reclamation or someone in the Federal Government will have responsibility for rebuilding and modernizing what we've built over the last 100 years. As you mentioned, Senator, the demand for water and power is growing, not shrinking, and we must maintain existing capacity if we're to meet the challenges of the future.

And third, Reclamation will have a need to manage construction of whatever new projects Congress authorizes and funds within the Reclamation program. Our long-term goal is to take action now to put in place the pieces at Reclamation that will allow it to meet all of those goals and that we rebuild and restore the trust that must exist between Reclamation and Congress and Reclamation and the public.

#### PREPARED STATEMENT

Senator, there's nothing that's been said with respect to 638 that we would disagree with, by either you or Senator Campbell. Mr. Ehat and Mr. Rinne are here if you wish to have a discussion of the details of the contract negotiations and I leave it to you, Mr. Chairman, as to whether you'd like them to summarize the actual process that Reclamation used and is using now for 638 or if you wish to move on to other areas of interest to you.

[The statement follows:]

#### PREPARED STATEMENT OF BENNETT W. RALEY

Mr. Chairman, I am Bennett Raley, Assistant Secretary of the Interior for Water and Science. My testimony today is intended to help the committee understand why the cost estimate to complete the Animas-La Plata Project (Project) increased from \$338 million in 1999 to \$518 million today, and to explain the steps we've taken to ensure that the problem does not recur.

#### BACKGROUND

The purpose of the Project, essentially, is to divert, pump, store, and convey water from the Animas River at Durango, Colorado to provide water for both Indian and non-Indian municipal and industrial uses in Colorado and New Mexico. It is required to fulfill the requirements of the Colorado Ute Settlement Act Amendments of 2000.

After several changes in the scope of the project over six decades, the project plan is now settled on four key project features: the Durango Pumping Plant; Ridges Basin Inlet Conduit; Ridges Basin Dam; and the Navajo Nation Municipal Pipeline. Project construction also required the relocation of parts of a county road and natural gas pipelines.

#### 2003 PROJECT CONSTRUCTION COST ESTIMATE

Reclamation began developing the new Project construction cost estimate in early 2003, which contained a total estimate of \$500 million, based on January 2003 price levels. The current indexed price for the project is \$518 million.

After these construction cost estimates for the Project were completed in July 2003, Secretary Norton directed Reclamation to review the costs associated with the project to explain the reasons for the increase in the construction cost estimate. Reclamation undertook a detailed and critical review of technical and administrative data, held discussions with Reclamation staff involved in program and construction management, and met with project sponsors to prepare the report. The complete re-

port, including a chronology of the project dating to 1956, is submitted for the record along with this statement.

In summary, there is no single reason why the construction cost estimate for the Project increased from \$337.9 million in 1999 to \$500 million in 2003. There are, however, several factors that contributed to the increased estimate that I will focus on today: (1) the accuracy and completeness of the 1999 construction cost estimate, along with additional costs associated with final Project design and construction; (2) the failure to include the cost of contracting under the Indian Self-Determination and Education Assistance Act (ISDEA) Public Law 93–638; and, (3) inadequate communication between Reclamation and sponsors of the Project concerning cost factors related to design options and decision-making.

#### THE 1999 PROJECT CONSTRUCTION COST ESTIMATE

In general, the report shows that, with the exception of the Ridges Basin Dam feature, the 1999 Project construction cost estimate was incomplete and inaccurate for the pumping plant, inlet conduit, gas pipeline and road relocations, and the newly-added Navajo Nation Municipal Pipeline.

The 1999 estimate was prepared by qualified engineers hired by the Ute Mountain Ute Tribe (UMUT) who relied upon several years of Reclamation data and analyses. Key factors that contributed to the underestimate included:

- Dependence on appraisal level information at the feasibility study phase;
- Mischaracterization of site conditions; and
- Failure to fully factor in the cost impacts of environmental and legislative requirements.

A crucial problem with the 1999 estimates was that they were identified as being at the feasibility level, when they were actually based upon less developed appraisal level data. Another factor that contributed was oversight. In the early 1990's, Reclamation was reorganized to give Area Offices greater autonomy to design and manage construction, eliminating the Technical Support Center's (TSC) oversight role. This fact alone contributed to the lack of attention to the 1999 estimates accuracy or source.

Despite concerns raised by TSC technical staff in Denver to the Western Colorado Area Office that the feasibility design and estimate used in the 1999 Draft Supplemental Environmental Impact Statement (DSEIS) did not contain sufficient information and detail to complete an in-depth review of cost estimates, work on the 1999 DSEIS pushed ahead without addressing this concern. In 1999 and early 2000, attention was on completing environmental requirements with limited focus on accuracy of the cost estimate.

Nevertheless, the 1999 cost estimate was included in the July 2000 Final Supplemental Environmental Impact Statement (FSEIS), used to support the Colorado Ute Settlement Act Amendments of 2000 authorizing the project, and formed the basis for negotiations of repayment contracts for some of the Project sponsors.

The 2003 estimate for the Durango Pumping Plant is \$52 million above the 1999 estimate. Approximately \$38 million of this increase was due to the type and quantity of material that must be excavated: bedrock vs. soil, and project management and site support costs.

Neither the total volume to be excavated nor the bedrock was factored into the initial design concepts by the contractor.

Another \$28 million of the increase was to relocate parts of gas pipelines and County Road 211 from the Ridges Basin Reservoir site, again due to increased excavation and directional drilling.

Reclamation did not identify these significant costs until completing final designs for the Durango Pumping Plant.

#### COSTS TO COMPLY WITH PUBLIC LAW 93–638

The spirit and intent of the ISDEA is to provide Tribes an opportunity to be self-determining and to take a more active role in those activities that impact their daily lives. Under the ISDEA, the Secretary must allow a Tribe to contract for any work that is a program, service, function, or activity administered by the Secretary for the benefit of a Tribe. The ISDEA is not a sole-source program; it is a congressionally mandated, direct-source program that directs the Secretary to contract with Tribes under certain situations. In the 1988 Settlement Act, Congress mandated application of the ISDEA to the Animas-La Plata Project.

Contracting under Public Law 93–638 (the “638 process”) differs from traditional competitive bidding. Under the ISDEA, the fixed-price construction contracts (requested by the Ute Mountain Ute Tribe) are to be comprised of: (1) the reasonable costs to the Tribe of actually performing the work; (2) the costs to the Tribe of audit-

ing the general and administrative expenses incurred by the Tribe in performing the work; (3) the costs of developing the project proposal; and (4) a fair profit.

The objective of the negotiations is to arrive at a fair and equitable price for the award, not to obtain the lowest possible award price. Nor does the price have to conform to either party's cost estimate.

The 1999 cost estimate did not include additional costs of applying ISDEA. Instead, it was based on construction costs in a competitive bidding environment. The 2003 Project construction cost estimate includes a 30 percent Estimating Difference Factor (EDF) that would be applied to future Project contracts. The intent of using the EDF was to try to more accurately estimate and account for Reclamation and contractor administrative and other costs likely to occur in negotiating future ISDEA contracts. While the 2003 EDF equate to \$43 million to apply ISDEA, accounting for 24 percent of the increase (none of which was included in the 1999 estimate), there is some optimism that the actual amount could be less for the remainder of the Project as Reclamation, the Tribe, and other Project sponsors work more closely on Project implementation.

#### COMMUNICATIONS BETWEEN RECLAMATION AND PROJECT SPONSORS

The report found that communications and discussions between Reclamation Project staff and Project sponsors about the cost factors related to design options and decision-making have been inadequate. Specifically, communication as required by existing contracts was not detailed or timely enough to allow sponsors input on construction plans and progress, changing conditions, or other information associated with the construction of the Project.

As a result of this finding, the Project Construction Committee was established by Reclamation in 2001 to provide a system to assure that necessary internal and external coordination and management of the project occurred during construction.

Reclamation has also reconfigured the Project Construction Committee to improve interaction and communications with the sponsors. It is our opinion that this reconfigured process seems to be working quite well at this time.

#### CONCLUSION AND NEXT STEPS

Mr. Chairman, despite the cost increases, Animas-La Plata is still a viable project and a high priority for our customers. Moving the project forward is crucial to satisfying the Indian Water Rights Settlement and meeting future non-Indian municipal water supply needs in southwestern Colorado and northwestern New Mexico.

Reclamation has completed or is taking steps to manage and complete the Project in the most cost effective and efficient way possible. These actions, when fully implemented, will provide the safeguards necessary to avoid similar occurrences on this and other Reclamation Projects in the future.

First, the basic construction cost estimate for the Project has been redone by Reclamation. Management efforts will continue to save costs during scheduling of construction and final design of components of the Project. Second, Reclamation has reviewed its internal organizational approach to construction of the Project and reconfigured the organization as necessary to improve construction management and interaction and communication with sponsors. Third, the ISDEA processes are being reviewed to improve efficiencies in construction of the Project. Fourth, as noted above, Reclamation has reconfigured the Project Construction Committee to improve the external communications with Project sponsors. Fifth, Reclamation will use Value Engineering processes, in cooperation with Project sponsors, to seek additional ways to reduce Project construction costs. Finally, Reclamation is reviewing its procedures for cost estimates and construction to identify and correct process deficiencies that may have led to the Animas-La Plata Project cost estimate problems.

Thank you for the opportunity to testify today and update this committee on the progress we are making in constructing the Animas-La Plata Project. I would be happy to answer any questions you may have at this time.

Senator DOMENICI. Senator Campbell, knowing your schedule, and you have a very important hearing and it has to do with Indian problems also, would you like to question?

Senator CAMPBELL. I have, yes, a couple. I appreciate it, Mr. Chairman. First of all, I have to tell you, Bennett, we have both known you for a long time, worked with you on a lot of different water projects. I am really upset about this, as is the Chairman, and reading your testimony while you were talking I have to tell

you that, as to your own omission, you guys really dropped the ball on this. As I understand it you had no experience dealing with 638 contracts yourself, or your department had not, and you did not do any research with any government agencies which had experience dealing with 638 contracts or with the Indian Self Determination and Education Act. Is that right?

Mr. RALEY. Senator, Reclamation had had minor exposure with 638 and some other projects including Central Arizona and others but nothing of this significance and complexity.

Senator CAMPBELL. Okay.

Mr. RALEY. And it's very clear that for good intentions, they thought that they could do it then move forward. The thing I love about Reclamation is they're can do. You give them a job, they're going to get it done. They did not stop and ask questions within the Department about the knowledge that was there, that could have avoided some of the misunderstanding and mischaracterizations that's occurred over the last couple of months as to the role of 638.

Senator CAMPBELL. All right. Well, let's move on since we have a short time. Reading your testimony, it says that \$38 million were increased over because of, and I quote, "site support costs, moving some gas pipelines and a county road." The only county road I know that really has to be moved is one that is pretty far away from where the pumping station is now. Why would that be included in the county road?

Mr. RALEY. Senator, may I ask Mr. Rinne to answer that?

Senator CAMPBELL. Yes, please do.

Mr. RINNE. Senator, the county road referred to there is within the Ridges Basin Dam site and that is the only one that was moved. That is part of the overall cost because it's included in the Ridges Basin Dam feature.

Senator CAMPBELL. Okay. It says you were not aware that it was going to be bedrock versus soil that would have changed the site support cost. Why did not somebody do some core drilling or something to find out what the hell was under the ground?

Mr. RALEY. Senator, I asked the very same question. And I'm going to refer to Mr. Ehat for the answer.

Mr. EHAT. Thank you, Mr. Raley. Senator Campbell, there were many exploration holes in the area. What I would characterize as the problem with the original estimate, the 1999 estimate, is that there were mistakes in interpreting that data that were not caught by Reclamation. We knew there was bedrock there sir, that was very clear.

Senator CAMPBELL. So you did some core drilling and who did the analysis of that?

Mr. EHAT. Reclamation had developed an extensive file of the information on the site, as well as Department of Energy, for the UMTE clean-up and that information was handed over to the estimators but as near as we can tell, Senator, that information was mischaracterized and mistakes were made.

Senator CAMPBELL. By who? By Reclamation or Energy? Who made the mistakes?

Mr. RALEY. I can answer that, Senator. Reclamation is responsible for the mistakes.

Senator CAMPBELL. Did I also understand you to say there was no single reason but design changes that were not anticipated were also part of it, between 1993 and 1995?

Mr. RALEY. Yes sir.

Senator CAMPBELL. What were some of the design changes? I know it was downsized to what is now called the Animas-La Plata Light. Is that the design changes you are talking about?

Mr. RALEY. That's one and in fact, some of the basis for the prior costs were based on the larger project where there were commonly assumed to be economies of scale that didn't necessarily exist in a downsized project. And I'll ask Mr. Rinne if there are others.

Senator CAMPBELL. So you assumed that with the downsizing of the project the costs would go down too but some of them did not?

Mr. RALEY. Yes.

Senator CAMPBELL. You also mentioned, as I think I heard you say, the changes in law between 1993 and 1995, there were some environmental law changes or changes in requirements of fulfilling environmental impact statements. Is that correct?

Mr. RALEY. Well, not changes in law, Senator, but a lack of foresight and incorporation of the costs of meeting environmental requirements.

Senator CAMPBELL. Who do you think should foot the bill for the cost overruns?

Mr. RALEY. That's something the Secretary is reviewing at this very moment. As you well know, Senator, the issue of reimbursability is one that the statute provides. The Secretary has a role in consultation with the project partners. We have already started those discussions with project partners and with Congress.

Senator CAMPBELL. Well, at this point do you believe as I do that the cost overruns should not be passed on to those water users who are going to be purchasing the water, since they had no idea that there was going to be this kind of a cost overrun?

Mr. RALEY. Senator, I do not have an administration position on that point.

Senator CAMPBELL. How will the flow of funds, including the request in this year's President's budget, on the Animas-La Plata affect its completion?

Mr. RALEY. Well, conceptually, depending on what Congress does this year, that will define how much ground we have to catch up for future years. As you well know, the project was to be constructed over 7 years and appropriated over 5. Now we have two factors. We have the cost increase, which increases our challenges dramatically, but we also have funded the project at its basic capability so far and put off for succeeding years the building of the appropriations so that we can complete construction in 7. We have been engaged with committee staff to talk about various options for completing the project in accordance with the law, given the new realities of the remaining amount needed to be appropriated, including the cost increase.

Senator CAMPBELL. So you do not have a revised schedule for completion at this time?

Mr. RALEY. Well, at the present time, and Mr. Ehat can speak in greater detail, we're proceeding under existing law and appropriations. The question, Senator, if I may, is given the additional

cost increase, we can either cover that by increasing the appropriations for Animas-La Plata, early and then ramping down. Or we can flatline the appropriations, stretch out the project longer. There are additional costs associated with stretching it out longer.

Senator CAMPBELL. Can you compare those real quick? I mean, facing a \$500 billion deficit this year, we are in a world of hurt and all of our subcommittees have already pretty much been told that we are going to have some very tight spending caps and I think that is going to last for a number of years, myself.

Mr. RALEY. As do we, Senator.

Senator CAMPBELL. And that reality tells me that we are probably not going to be increasing the money so we are going to have to go the other way if it is completed and extend the time frame in which it is built. You do not have an estimate on the number of years that would extend it if we went that, do you?

Mr. RALEY. We have options. It's not an infinite range but it's a question of what can be done without increasing the costs unacceptably and fit within the administration's budget and what Congress chooses to do. In all likelihood one option will be to extend the construction by a period of several years. There are also options for meeting the original 7 year.

Senator CAMPBELL. When you said there is a cost of extending it also it is by several years? Did I understand that is what you just said? Do you have any kind of an estimate on that? What if we extended it several years, over and above this already cost overrun, what it would cost?

Mr. RALEY. Senator, if you'll allow me, given the sort of sorry record we're dealing with right now with estimates that weren't fully vetted and thought through, I'd like to decline compounding that error by giving you our rough estimates now and having, not you but others, mistakenly rely on those. I will commit to you, to the Chairman and to your staff, that we will provide you with all the data that we have in terms of options so that we fully understand the benefits and costs of a particular funding stream. I just don't want to repeat a mistake we're dealing with of giving with a number that is wrong.

Senator CAMPBELL. I understand. This is one mess, you know that.

Mr. RALEY. Yes sir.

Senator CAMPBELL. You heard the chairman mention, in the middle of his statement, that maybe we ought to just stop the thing in the middle or something. I do not think, my own view is that that's not an option because if we did stop it the cost would be more for stopping than it would be for building it, if you factor in the tribes going back to courts. And you know that is how we got in this in the first place. And if we had gone to court we had some estimates that, I mean, even before it was revised down to what is called Animas-La Plata Light, we had some estimates that costs of fulfilling our obligations to the tribes which probably would have won in court because they have those old, original treaty rights that pretty much gives them first priority in the water down there, it would have cost more than building a project even when it was at its highest level of funding, before it was downsized. In addition to that, some of the numbers that we got back with the number of

farmers and ranchers and homes and so on that would literally be without water if the tribes won in court and then appropriated their water. So in my view we are in a mess but it is a mess we have got to fix and move forward, we cannot just stop the thing, it has got to go forward. But there is no doubt in my mind too, it is going to be tough to find the money without the project time frame over a period of years. And I know that some of the other members even that could not be here today, they are pretty concerned about it too because a lot of the Western people who have been supportive of this over the years are now saying, "Oh my gosh, what has happened to us? How come we did not know all the numbers before we supported the project?" So I would just encourage you to get back with this information as quick as you can on some estimates about extending the building time frame.

Mr. RALEY. Yes, sir.

Senator CAMPBELL [presiding]. I have no further questions. Was the Senator coming back in a minute? Why do not we just sit for a recess for a few minutes until Senator Domenici comes back.

You might not be the right one to answer this but I do have one more I was going to ask. Someone has told me, although I have not seen anything documented about it, that the amount of archaeological things that were found in the site far exceeded what had been expected and that was one of the things that took a lot more time and a lot more manpower because they are required by law to find all these things that are on the ground, pot shards or, you know, things that have been left there of eons of people that lived in that area before we ever got there. Do you happen to know the size of the increase?

Mr. RALEY. Senator, I'll ask Mr. Ehat to respond. The answer is yes, there was very substantial in terms of the additional cultural work that was done.

Senator DOMENICI [presiding]. Mr. Ehat, you want to help with that?

Mr. EHAT. Yes sir.

Senator DOMENICI. Go ahead.

Mr. EHAT. Our estimate of that increase is about \$7.5 million.

Senator CAMPBELL. Seven-and-a-half million dollars? That is in manpower and so on?

Mr. EHAT. That's correct, sir.

Senator CAMPBELL. Thank you, Mr. Chairman.

Senator DOMENICI. Well, if your estimating on that is as bad as the rest it could be \$20 million. In any event, let me tell you that I know the Commissioner could not be here and I know the Secretary is very busy. But I want to tell you so you can carry it back to the Commissioner, I have been advocating for the last 3 years, trying to put more work in the Bureau. And it is a little easier up here, budget appropriation-wise, to try to do that. But you might as well tell them that I am not very impressed and I do not know if I am going to continue down that path. I do not know that the Bureau is going to be growing. If they cannot do this, you know, I am going to go with the Corps of Engineers. And I do not look for projects of this magnitude for awhile that I am any part of, going to the Bureau of Reclamation unless they convince me that they have had a material change in the way they do business. Now,

I am sorry about that but, I am in a position that we do not know where we are going to get the money. That is the problem. It is not a problem of just talking. The money given to this subcommittee is not enough to take care of the subcommittee on what we estimated. And then we have to argue about water every year, you know that, you guys go before OMB and it does not make a darn what we need, they give us less. Right? We cannot do it this year. There is not enough money. So I hope you understand.

Mr. RALEY. Senator, I will deliver that message to the Secretary. Senator DOMENICI. Please do.

Mr. RALEY. But I know she, philosophically, agrees with you. If we can't fulfill our obligations to Congress and the public then something needs to change.

Senator DOMENICI. The other thing I want to tell you is, you know, from my standpoint, this is one of the most important projects that I joined him in putting together. And we had plenty of opposition, right?

Senator CAMPBELL. Right.

Senator DOMENICI. And we did it because we thought the Indian solution was so big that it permeated the arguments that were given. And here we end up, those people who were opposed, they are probably laughing at us. And so I want to get on with this. And also, out there in the audience there are various groups, like mine, from San Juan County. They do not have a lot of money, they are up here saying, how do we find the \$7 million or \$9 million that this cost estimate is going to cost us? And I do not know how to find it. I do not want them to pay it but I do not know how to find it. So I wish you would be looking at that, the overruns for others who do not have the money. You know, they cannot come up here and ask us for it so they are there in San Juan County and there must be more of them, right?

Senator CAMPBELL. Sure. All the water users.

Senator DOMENICI. And they are getting shafted. So we have got to be concerned. In my opinion you ought to ask for more money in sort of an asterisk column, saying we cannot expect those who approved of this project and joined it, we cannot expect them to pay this overrun. The overrun we are paying for but I do not know if we are going to get the money we are paying for it, right? But I do not know how these others are going to do it so I am worried about it, all right?

Now, has the Bureau developed a new completion schedule for this project?

Mr. RALEY. Mr. Ehat?

Mr. EHAT. Yes sir, we have, and we're looking at, based on the new estimate and a reasonable funding level, about a 2-year delay on the features and about a 3-year delay on first fill.

Senator DOMENICI. So you are going to spread the money and needs out a little?

Mr. EHAT. That's correct, sir.

Senator DOMENICI. To ease up a little bit on our budget. Okay. Is this schedule based on optimum annual funding allocations or on historic funding levels?

Mr. EHAT. Well Senator, we are working with you and your staff to provide options.

Senator DOMENICI. Okay.

Mr. EHAT. In terms of future funding obviously we're going through that internally with the 2006 budget as we speak and that's going to be dependent on decisions you make with respect to the 2005 budget and, you know, we can't select, at this point, exactly what the option will be.

Senator DOMENICI. Right.

Mr. EHAT. But we want to provide you with all the information we have.

Senator DOMENICI. Well, what might the impact be to the total project cost if you assume less than optimal funding?

Mr. EHAT. Well, depending sir, on how far it stretches out you could see increased costs over and above the \$500 million plus indexing of, under one scenario for stretching out our number of years, \$38 million, for example of additional costs just associated with an extended delay. But again, we're working with the information, it's almost a numeric analysis, we're trying to figure out what the right suite of options are to share with you as we deal with the reality.

Senator DOMENICI. All right. Report to the Secretary indicates that there has been a legislated cost ceiling in place. If the Bureau would have examined its cost data then that would have worked. This sends an awful, troubling message that unless there is a cap on the funds you do not have to worry about accuracy. But a cap is not good either. We do not like them because then we have to come back here and play with the caps because we do not expect, in a project of this magnitude, that there are no changes. So I hope that you are doing something to change this philosophy and I certainly hope you are doing that in a way that we can understand. And I would like you to tell us, not now, but to get us information on that as soon as you can.

Mr. RALEY. Yes sir.

Senator DOMENICI. If so, is the Department comfortable enough with their current estimate of \$500 million that it could be used as a basis for a ceiling if we choose to do that?

Mr. RALEY. Five hundred million dollars plus indexing.

Senator DOMENICI. What?

Mr. RALEY. The \$500 million plus indexing.

Senator DOMENICI. Yes.

Mr. RALEY. Yes sir.

Senator DOMENICI. What do you guys, you two experts, what do you say about that?

Mr. RINNE. I agree, Senator. We feel that \$500 million with indexing is something we should be able to stay with.

Senator DOMENICI. Okay. There have been significant expenditures that cost the sharing partners and they do not feel they should be required to pay. I told you that.

Mr. RALEY. Yes sir.

Senator DOMENICI. Including costs associated with what appears to be errors on the part of the Bureau as well as old sunk costs that really are irrelevant to the projects currently under construction. Are there any remedies within the Department that would allow for relieving these cost-sharing obligations? And if not, would this have to be addressed legislatively?

Mr. RALEY. Senator, the statute itself, with respect to Animas-La Plata provides for secretarial determination of reimbursability of costs and there's a standard set out in the statute. We are part of the way through an intensive legal review of that issue. Obviously there's the factual review of the basis for the cost increases and we have already started what is provided for in the statute and that is dealing with this issue in cooperation with the project sponsors.

I'd like, if I could go back a moment, to say that our comfort in the \$500 million plus indexing is predicated on the assumption that appropriations are.

Senator DOMENICI. Senator Campbell, before you leave, could I ask you, do you feel comfortable with my assumption that these cost-sharing people that are not part of direct depart, that we ought to look at how much their increase is, the increase for which they had nothing to do.

Senator CAMPBELL. Mr. Chairman, when you were out of the office I did mention that to Bennett that I did not think they should be responsible at all since they had nothing to do with it and they are just going to get blind-sided with an increase that the water users should not have to pay for this cost overrun.

Senator DOMENICI. Okay. So what you are going to do is check this very carefully, Senator.

Senator CAMPBELL. Yes sir, we are in the process.

Senator DOMENICI. Now if that does not fit in the \$500 million you have got to tell us, because if we have to pass separate legislation, No. 1, is it in, No. 2, is it legal? Right? Will you do that for us?

Mr. RALEY. Yes sir.

Senator DOMENICI. Okay. Thank you. I will be over at your hearing in about 30 minutes.

Six-thirty-eight process. You indicated that \$43 million increase in the cost is attributed to this process. I would like to know how much of that \$43 million, or how it breaks down? In other words, how much of the Bureau of Reclamation oversight of the contract, how much is purely due to contract negotiation processes?

Mr. RALEY. Well Senator, for purposes of the 2003 cost estimate for planning purposes the Bureau was conservative so there are no future surprises for you and others, put in a factor of 30 percent to cover the costs associated with 638. That does not mean that the tribes have or will have a 30 percent profit, as some have said, nor does it mean that the actual cost will be that. The Bureau, with its new understanding of what 638 is and is not, and with cooperation of the tribes, is working through the individual contracts and are quite hopeful if not comfortable that the 30 percent, which is put in there for planning purposes, will be in excess of what is actually required.

Senator DOMENICI. Well, I do not know if the Indian leadership that accepted the responsibility under 638 are present here. Are they? They are in the second panel? Okay. Then we are going to take up a few questions with them.

Mr. RALEY. Yes sir.

## ADDITIONAL COMMITTEE QUESTIONS

Senator DOMENICI. I do not think we ought to give them carte blanche either. You know, they have got to do this in a way that is realistic and should minimize your employment needs on the civilian side. So with that, there are some things you have got to get us, would you get them to us as soon as possible?

Mr. RALEY. Yes sir.

Senator DOMENICI. All right. You are excused.

Mr. RALEY. Thank you sir.

[The following questions were not asked at the hearing, but were submitted to the Department for response subsequent to the hearing:]

## QUESTIONS SUBMITTED BY SENATOR PETE V. DOMENICI

## SCHEDULE AND COST

*Question.* Has the Bureau developed a new completion schedule for the project?

Answer. Yes, Reclamation has developed a revised completion schedule. This schedule is being evaluated in light of various funding scenarios.

*Question.* Is this schedule based on optimum annual funding allocations or historical funding levels?

Answer. The schedule currently used for project management is based upon a reasonable funding level with currently appropriated amounts, the President's request of \$52 million for fiscal year 2005.

*Question.* What might the impact be to the total project cost if you assume less than optimal funding?

Answer. Should a slow funding level result in decreasing the efficiency of construction which results in as much as a 2-year delay, an increase could be expected of as much as \$38 million above the \$500 million project cost estimate, not including indexing. We are continuing to study various funding scenarios and associated impacts on the construction schedule and corresponding impacts to the project cost estimate.

*Question.* Has this information been communicated to the cost sharing partners?

Answer. Reclamation is actively consulting with the project sponsors. During our last project coordination meeting, Reclamation discussed and highlighted this issue with the project sponsors and specifically described that delays in the project schedule could increase overall project costs.

## LEGISLATED COST CEILING

*Question.* The report to the Secretary indicates that had there been a legislated cost ceiling in place, the Bureau would have examined its cost data more rigorously. This sends an awfully troubling message: that unless there is a cap on the funds, you don't have to worry about accuracy and dependability in your project data. I certainly hope that you are doing something to change that philosophy.

My question to you is: Do you feel that imposing a cost ceiling at this stage of the project would be beneficial?

Answer. A great deal of focus is towards containing costs and completing ALP within the updated cost estimate amount. This amount must, of course, be adjusted for inflation. While a cost ceiling may be perceived as beneficial, we do not feel it, by itself, would effectively control costs. However, should Congress impose a ceiling, we would not object.

*Question.* And if so, is the Department comfortable enough with their current cost estimate of \$500 million that it could be used as a basis for such a ceiling?

Answer. Reclamation, in partnership with the project sponsors, is aggressively looking for opportunities for cost savings in the implementation of the ALP project. Barring any unforeseen external factors or funding delays driving up total completion costs, Reclamation believes we can construct the ALP within the 2003 construction cost estimate of \$500 million. Of course this figure would be adjusted annually for inflation, possibly resulting in a larger total figure, but would still be considered at or below the \$500 million level in January 2003 dollars. This would be the only increase in the total cost of that project that we can foresee, keeping in mind that construction of major civil works is an inherently uncertain field.

## COST REIMBURSEMENT

*Question.* There have been significant expenditures that the cost sharing partners don't feel they should be required to pay, including costs associated with what appear to be errors on the part of the Bureau, as well as old "sunk costs" that really are irrelevant to the project currently under construction.

Are there any remedies within the Department that would allow for relieving these cost sharing obligations?

*Answer.* Reclamation is reviewing the options available within current laws and policies to address the allocation of project costs among the various project purposes and beneficiaries. It is the firm position of the administration that project beneficiaries for all projects should contribute their fair share of the reasonable and unforeseen project costs.

*Question.* If not, would this have to be addressed legislatively?

*Answer.* Reclamation is working very diligently with the cost sharing partners to explain all of the costs and the associated allocations.

## CHANGES IN DESIGN AND CONSTRUCTION

*Question.* There were changes made to some of the project features that resulted in major increases in cost.

Could you summarize these changes and explain why they were made?

*Answer.* Additional costs relating to completion of final design and decisions made on project features or their components since the project was authorized for construction in December 2000 explain most of the revision in the cost estimate. The largest increases in the cost estimate were from: (1) the additional excavation requirements for two components of the Ridges Basin Dam (gas pipelines and County Road 211 relocations, and (2) the actual site conditions at the Durango Pumping Plant, (the presence of mostly bedrock rather than common soil materials and construction support requirements). In both cases, these requirements were identified after completion of the original cost estimate when decisions were made by Reclamation about relocations and when the design process had advanced sufficiently to expose under-estimates of quantities and types of material respectively.

*Question.* Can you explain the process that was used for communicating these changes with the project partners?

*Answer.* Some information was provided through compliance reviews such as environmental assessments and also as a part of the updates during Project Construction Committee (PCC) meetings.

More recently, Reclamation has implemented a process to manage, track, and report cost and schedule changes. This process yields clear data that are shared with project sponsors on a regular basis.

*Question.* Has anything been done to improve this process?

*Answer.* Reclamation has reconfigured the PCC and has redoubled its efforts to consult with project sponsors on the scheduling of construction activities, tracking costs, reviewing design changes on an ongoing basis with all project sponsors. This process includes "real time" reporting of all issues and holding periodic (monthly) face to face project update meetings with all project sponsors.

*Question.* Do you feel that these improvements will satisfy the obligations set forth in the contracts the Bureau has with the paying partners?

*Answer.* Yes, we are confident that the changes will meet the obligations in the repayment contracts paying partners.

## 638 PROCESS

*Question.* You indicated that a \$43 million increase in the cost is attributed to the 638 process.

I'd like to know how that \$43 million breaks down. In other words, how much is for Bureau of Reclamation oversight of the contract, how much is purely due to the contract negotiation process, etc.?

*Answer.* The \$43 million figure is a conservative estimate to account for both the additional costs that can be incurred through the application of Public Law 93-638, and changes in the scope of the contract that occur during any negotiated procurement.

*Question.* In theory, the 638 process is supposed to provide the opportunity for Native Americans to "fill the shoes of federal employees", which should result in lower staffing levels by the Federal agency. Could you address the impacts to staffing levels on this project as a result of the process?

*Answer.* The 1988 Settlement Act specifically allows the design and construction of ALP to be subject to the provisions of the Public Law 93-638 Act. The Tribes

have, in detail, designated the specific activities they will take the lead in performing. Reclamation's project functions have been designed around those designated Tribal activities, resulting in no identified duplicated functions. The application of the 638 process at ALP has provided the Tribes many opportunities to enhance their skills and to become more self sufficient. We believe the Tribes are taking full advantage of these opportunities.

*Question.* Had the 638 process not been congressionally mandated, would it have been a viable option for accomplishing this project?

Answer. Yes.

#### BUREAU OF RECLAMATION PROCESSES

*Question.* You claim that you have taken steps to improve the structure of the Bureau of Reclamation team that is working on the project.

Can you explain these steps and also explain how they will improve the functionality of the team?

Answer. First, we have realigned the reporting structure (chain of command) in Reclamation's Upper Colorado Region so that the ALP Project Construction Engineer now reports directly to the Regional Director and all on-the-ground construction functions report to the Project Construction Engineer. This essentially utilizes highly experienced construction management staff in control of the project.

Second, we have initiated new cost-tracking procedures that relate all project costs to the cost estimate in order to detect problems early and avoid surprises. This system provides an accurate ongoing evaluation of project progress vs. the construction cost estimate. Finally, the PCC provides a medium for constructive, ongoing input from project sponsors.

*Question.* It concerns me that critical members of the Bureau's project team are not co-located in Durango. As I understand, some functions reside in Grand Junction, and others even as far away as the Regional Office in Salt Lake. Wouldn't it be a good idea, especially given the situation, to have a dedicated team on site?

Answer. A dedicated on-site team is being utilized. Some support functions are being used from the Grand Junction and Salt Lake City offices for efficiency. These support services are for items such as environmental support, archeological support, personnel support, budget support, etc. This allows the on-site team to not fully staff for these functions, thereby reducing the overall project costs.

*Question.* Please outline for the committee the Bureau responsibilities for ALP before and after the July cost overrun was identified.

Answer. The organization charts shown on Attachment 1 identify Reclamation's current organization and our organization prior to the issuance of the revised Project Cost Estimate in July, 2003. Reclamation has taken some aggressive actions to complete the Animas-La Plata Project in the most cost effective and efficient way possible. The newly established construction office has the sole responsibility to construct the project, a format that we have full confidence in being successful. We have increased the level of coordination and consultation with the project sponsors so that they are properly involved in decisions on the project, and I have developed a system to allow for open and complete cost accountability.

*Question.* When the July estimate was released, how much had been spent on ALP activities up to that point—post-1998? Include sunk costs.

Answer. When the revised project estimate of \$500 million was released in July 2003, a total of nearly \$131 million had been obligated on the Project. This includes sunk costs of approximately \$68 million (expended through fiscal year 1998) and \$63 million obligated from fiscal year 1999 forward.

*Question.* Please provide a categorical breakdown of non-contract costs of ALP.

Answer. Attachment 2 provides a breakdown of the Reclamation non-contract costs in a tabular form. The table identifies the number of Full-Time Equivalent (FTE's) Reclamation employees by office and by project feature. The table also provides a general description of the functions being performed by the various offices on each of the project features.

*Question.* ALP report only discusses firm fixed-price contracts and obligations. Provide information on other ways the 638 contract is used for other than fixed price contracts. What other types of contracts are involved in 638 for ALP? Provide the size and cost of the contracts.

Answer. The ISDEA (Public Law 93-638) process is used for a variety of contracting purposes with the Ute Mountain Ute and Southern Ute Indian tribes. The use of firm-fixed price contracts for the construction work on the features in Southwest Colorado is described in the Commissioner's report. The following tables detail the work activities performed by the Ute Mountain Ute and Southern Ute Indian tribes under 638 contracts for non-construction work.

## NON-CONSTRUCTION 638 CONTRACTING

|                                                                                                                                                                       | Value                    | Number of Tasks |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|-----------------|
| Cultural Resource Mitigation Cooperative Agreement .....                                                                                                              | \$12,053,012             |                 |
| Tribal Services Cooperative Agreements: <sup>1</sup>                                                                                                                  |                          |                 |
| Ute Mountain Ute Tribe (Proposal preparation, Management of tribal activities, Tribal involvement in meetings, Vegetation management on mitigation lands, etc.) ..... | \$1,692,253              | 8               |
| Southern Ute Indian Tribe (Aquatic monitoring, Land acquisition appraisals) .....                                                                                     | \$88,148                 | 3               |
| Total .....                                                                                                                                                           | \$1,780,401              | 11              |
| Future Services Cooperative Agreements: <sup>2</sup>                                                                                                                  |                          |                 |
| Ute Mountain Ute Tribe (Tribal management, tribal involvement in meetings, etc.) .....                                                                                | <sup>3</sup> \$2,750,000 |                 |
| Southern Ute Indian Tribe (Aquatic monitoring) .....                                                                                                                  | <sup>3</sup> \$120,000   |                 |
| Total .....                                                                                                                                                           | <sup>3</sup> \$2,870,000 |                 |

<sup>1</sup> Includes costs from start of construction in 2001 to current. Does not include value of work performed by tribes prior to 2001.

<sup>2</sup> Does not include contingencies.

<sup>3</sup> Estimated value.

**Question.** Please provide a briefing on the philosophy of the construction schedule for ALP—flow rate of funds, what it means from year to year. Clearly mark where funding authority ends.

**Answer.** The schedule for Animas-La Plata has been revised to incorporate the 2003 CCE. The net result of the revised project schedule is a delay of project features of approximately 3 years and a delay of reservoir first fill completion of approximately 3 years to 2011. Current funding authority expires in 2006. The revised project schedule is based upon a reasonable level of funding per fiscal year and maintains the high risk work of the Ridges Basin Dam and Durango Pumping Plant as high priority work. This allows the dam and the pumping plant to be constructed in an efficient fashion avoiding increased project costs due to stretching out production. However, in so doing other features have been moved in time to allow for the reasonable level of funding. One of these deferred features is completion of the Navajo Nation Municipal Pipeline (NNMP). The NNMP shows a delay of approximately 32 months beyond the previously accepted project schedule. The Reclamation team is prepared to brief the chairman and other committee members and staff in greater detail at your earliest convenience.

**Question.** Provide information on the IGCE estimate process. How accurate is it? What the estimates were, what was spent, how far over/under, on schedule, etc. What has BOR learned from the process so that it gets better?

**Answer.** Reclamation prepares planning level (appraisal and feasibility) cost estimates through procurement related estimates Independent Government Cost Estimates (IGCE) bid estimates as tools for project management. Planning level cost estimates such as feasibility cost estimates are used for project authorization while IGCEs are required by the Federal Acquisition Regulations (FAR) for procurement of construction projects. Reclamation utilizes proven techniques, bureau-unique knowledge, and accepted industry resources<sup>1</sup> to develop its cost estimates. All IGCEs are developed as if Reclamation were submitting a proposal to compete for the work using the same technical information available to prospective bidders.

Reclamation continually analyzes bid information on projects by evaluating the IGCE versus contractor's bids. Reclamation maintains and monitors bid results by the use of abstracts<sup>2</sup> showing comparison between the IGCE and contractor's bids. The IGCEs' of each unit price are measured against the bid results shown on abstracts. These are updated and used to improve the accuracy of IGCEs' and unit price for subsequent cost estimates (planning through IGCE).

Reclamation publishes quarterly the Bureau of Reclamation Construction Cost Trends (published in the Engineering News Record). These trends track price fluctuations for features of work specifically being constructed by Reclamation.

Reclamation's Dam Safety Program is the single largest construction program in Reclamation at the present time. As noted in Appendix 2, page 2–5 of the Commissioner's report to the Secretary, the program has completed 65 modifications at an

<sup>1</sup> Industry resources—Construction Cost estimating resources such as; MEANS, Richardson, CAT Handbook, etc.

<sup>2</sup> Abstract—Compiled by the Contracting Officer showing the bid results for each construction procurement.

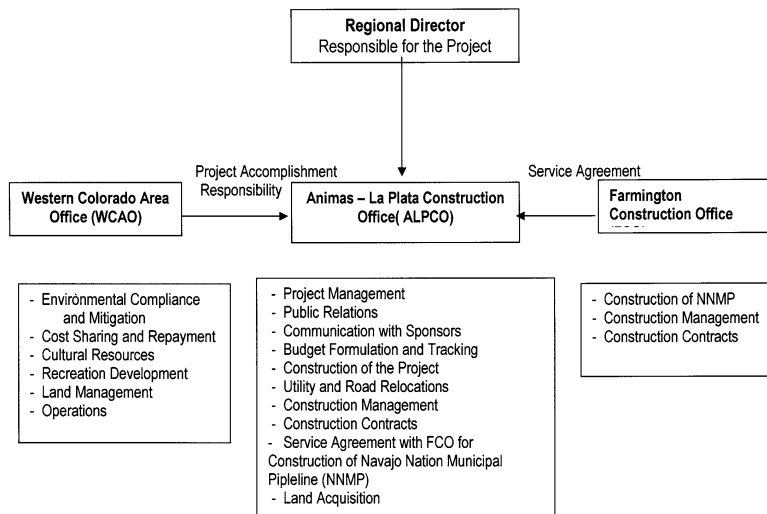
overall cost of approximately 86 percent of the total estimated cost of the projects. While there have been historical variations in actual costs from the originally estimated costs, our office actively engages in management techniques to both control costs and to evaluate cost saving measures.

For the Animas-La Plata contracting, a process has been established where by the field construction office contracting staff provides pertinent actual costs of the construction contractor to the Technical Service Center. This information is evaluated and utilized where appropriate in development of subsequent IGCEs for the Animas-La Plata procurement process. This process is consistent with the provisions of the Public Law 638, Indian Self Determination, Education, and Assistance Act for fixed price construction contracts.

## ATTACHMENT 1

### Animas - La Plata (ALP) Project

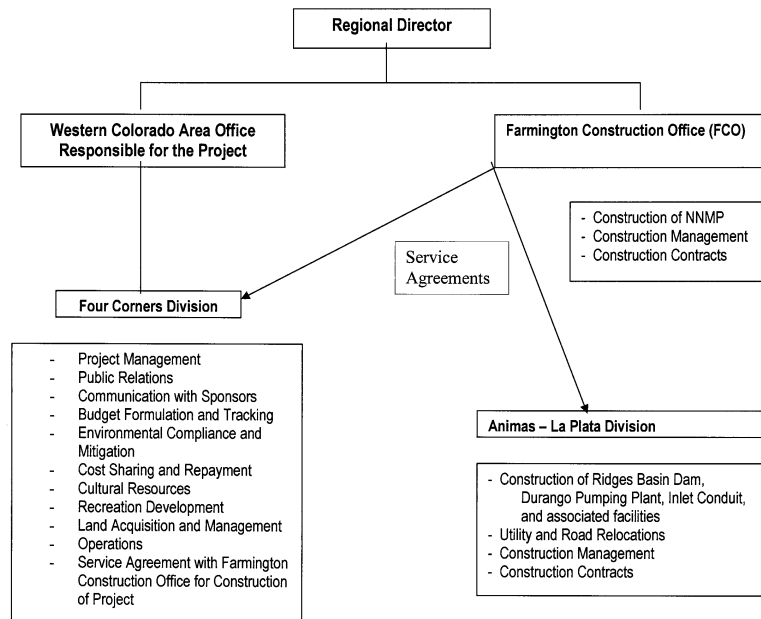
#### Current ALP Organization



ALPCO – Solely responsible for the construction of the Project.

WCAO – Responsible for accomplishment of non-construction activities related to the Project.

FCO – Provide service to ALPCO for construction of NNMP.

**Previous ALP Organization**

**ATTACHMENT 2.—ANIMAS-LA PLATA PROJECT—COLORADO AND NEW MEXICO—FISCAL YEAR 2004 RECLAMATION STAFF ESTIMATES AND FUNCTIONS (SEE LISTING BELOW)**

| Activity                                   | ALPCO        |                                  | FCO         |                               | WCAO—Durango |                   | WCAO—Grand Junction |                  | Regional Office |                      | TSC (Denver) |               |
|--------------------------------------------|--------------|----------------------------------|-------------|-------------------------------|--------------|-------------------|---------------------|------------------|-----------------|----------------------|--------------|---------------|
|                                            | FTE's        | Function(s)                      | FTE's       | Function(s)                   | FTE's        | Function(s)       | FTE's               | Function(s)      | FTE's           | Function(s)          | FTE's        | Function(s)   |
| 1—Project Management .....                 | 0.86         | a, b, c, d .....                 | 0.23        | a, b, c .....                 | 1.31         | a, b, c, d, g, u. | 0.40                | a, b, c, d, u .. | 0.41            | d, g, u .....        | 0.31         | a, c          |
| 2—Program Management .....                 | 2.92         | e, f, g .....                    | 0.00        | .....                         | 0.24         | e, f, g .....     | 0.05                | e, g .....       | 0.05            | e, g .....           | 0.25         | g             |
| 3—Cultural Resources .....                 | 0.21         | o .....                          | 0.05        | n, o .....                    | 1.00         | o, s .....        | 0.00                | .....            | 0.04            | s .....              | .....        | .....         |
| 4—Fish, Wildlife, and Wetlands Mitigation. | 0.87         | n, o .....                       | 0.00        | .....                         | 2.40         | k, l, m, n, s, t. | 0.10                | s, t .....       | 0.20            | s, t .....           | .....        | .....         |
| 5—Fishery Enhancement .....                | 0.01         | a, c .....                       | 0.00        | .....                         | 0.15         | a, c, h, s .....  | 0.62                | l, m, n .....    | 0.05            | l, m .....           | .....        | .....         |
| 6—Ridges Basin Dam & Reservoir .....       | 22.86        | a, b, c, d, f, i, j, n, o, p, u. | 0.00        | .....                         | 1.95         | h, i, k, s .....  | 0.01                | c .....          | 2.92            | c, h, i, j, n, o, p. | 3.75         | m, n, p, q, r |
| 7—Durango Pumping Plant .....              | 16.35        | a, b, c, d, i, n, o, p, u.       | 0.00        | .....                         | 0.69         | h, i, s .....     | 0.00                | .....            | 1.19            | c, h, n, o, p ..     | 4.72         | m, n, p, q, r |
| 8—Navajo Nation Municipal Pipeline .....   | 0.00         | .....                            | 8.16        | a, b, c, d, i, l, m, n, o, p. | 0.22         | h, s .....        | 0.02                | a, c .....       | 0.10            | c, p, o .....        | 0.74         | m, n, p, q, r |
| 9—Ridges Basin Inlet Conduit .....         | 0.95         | a, b, c, d, i, l, o.             | 0.00        | .....                         | 0.06         | h, s .....        | 0.00                | .....            | 0.04            | c, i, o .....        | 0.01         | l             |
| <b>Totals .....</b>                        | <b>45.03</b> | <b>.....</b>                     | <b>8.44</b> | <b>.....</b>                  | <b>8.02</b>  | <b>.....</b>      | <b>1.20</b>         | <b>.....</b>     | <b>5.00</b>     | <b>.....</b>         | <b>9.78</b>  | <b>.....</b>  |

Total FTE's=77.47.

Reclamation Staff Functions Include: (a) Project Management; (b) Sponsor Coordination and Consultation; (c) Federal & Non-Federal Agency Coordination; (d) Public Relations; (e) Budget and Accounting; (f) Project Scheduling and cost estimate updates; (g) Up Front Cost Share Agreement Administration and Reclamation Contract Prep. & Admin; (h) Supplemental NEPA Compliance; (i) Land and Land Interest Acquisition; (j) Utility Relocations; (k) Land and Water Management; (l) Investigations and Pre design; (m) Design; (n) Contract Negotiation & Procurement Support; (o) Contract and Cooperative Agreement Administration; (p) Quality Assurance including safety; (q) Design Support during Construction; (r) Geology Support during Construction; (s) Environmental and Cultural Resources Oversight; (t) Mitigation Planning and Implementation; (u) Project Operations.

Notes.—FTE—Full-Time Equivalent; ALPCO—Animas-La Plata Construction Office; FCO—Farmington Construction Office; WCAO—Western Colorado Area Office; Regional Office—Upper Colorado Regional Office, Salt Lake City, Utah; TSC—Technical Service Center, Denver, Colorado; Washington DC staff not charged to A-LP.



## NONDEPARTMENTAL WITNESSES

Senator DOMENICI. Can we have the next panel, please? Howard Richards, Chairman of the Southern Ute Indian Tribe. Selwyn Whiteskunk, Councilman of the Ute Mountain Ute Tribe. Mike Griswold, President of the Animas-La Plata Water Conservation District. And Randy Kirkpatrick, Executive Director of the San Juan Water Commission. If we can have you all there.

Thank you all. In particular I thank my friend from San Juan for coming. You have been working on this project from the time your hair was black until it got gray. That is pretty long.

Mr. KIRKPATRICK. That's correct.

Senator DOMENICI. Now, we are going to start right now. What shall we start with? Okay, Howard Richards, Chairman of the Southern Ute. Mr. Chairman, proceed.

### STATEMENT OF HOWARD D. RICHARDS, SR., CHAIRMAN, SOUTHERN UTE INDIAN TRIBE

Mr. RICHARDS. Good morning. Mr. Chairman, thank you for the opportunity to testify today. I am Howard Richards, Chairman of the Southern Ute Indian Tribe. I ask that my full statement be part of the record. I will briefly summarize my testimony.

Senator DOMENICI. It will be.

Mr. RICHARDS. First I want to express the tribe's appreciation to you and Senator Campbell for your support for the Animas-La Plata Project.

Senator DOMENICI. Thank you.

Mr. RICHARDS. And the settlement of the tribe's water rights claim. Without this committee's support the Southern Ute Tribe would face a difficult court battle to obtain the water rights to which the tribe is entitled. We believe that building ALP and settling the tribal claims through development of new water supplies is a much better choice for the tribe and its neighbors in Colorado and New Mexico. We appreciate that you and Senator Campbell continue to work hard to help us accomplish that goal.

Mr. Chairman, ALP is the heart of the settlement of the water rights claim of the Southern Ute Indian Tribe. It will provide the tribe and our sister tribe, the Ute Mountain Ute Tribe, with water to meet tribal needs now and into the future. The tribe has always recognized that it needs a firm and reliable water supply to create a permanent homeland for which the Southern Ute Reservation was meant to provide. ALP is a critical part of that plan because it allows the tribe to obtain the water supplies which it needs without depriving our neighbors of the water supplies that they have used for many years. The tribe has worked hard to make ALP and the settlement of their tribal water claims a reality. We have been fortunate to have neighbors and State governments in New Mexico and Colorado who recognize the need for additional water supplies

and who have fought for ALP. The Tribe appreciates the many contributions and sacrifices that those parties have made.

As you know, ALP has a long history. In 2002 Congress amended the 1988 Settlement Act to allow the settlement of the tribal claims through the construction of a smaller project that will provide Ute Tribes and water users in Colorado and New Mexico with water only for municipal and industrial uses. As this hearing demonstrates, the construction of the smaller ALP is a difficult job that requires the cooperation of many parties and the Federal Government. We were very disappointed by Reclamation's announcement last summer of its increased cost estimate for the project. It is important to build the project in a cost-effective fashion and on time. The failure to build the project on time would once more upset the settlement of tribal water rights claims. It is also important that our neighbors receive project water at a reasonable cost consistent with their expectations at the time the 2000 amendments were passed.

I want to emphasize that there is much to do and that we must all continue to work together. The actual construction of the project is complicated and there are a number of other obligations such as environmental mitigation that must be met to build the project on time. Funding is also crucial. Without adequate funding the schedule will be delayed and the cost of the project will increase. There are also some issues which must be resolved through the parties. I'm confident that we can meet those challenges and complete the project and the settlement.

#### PREPARED STATEMENT

Mr. Chairman, in closing I want to emphasize the importance of ALP to the tribe. The tribe wants to do whatever it can to accomplish the goal of building the project on time and in a cost-efficient manner. With that, Mr. Chairman, I thank you and the committee. [The statement follows:]

#### PREPARED STATEMENT OF HOWARD D. RICHARDS, SR.

Mr. Chairman, thank you for the opportunity to testify today. I am Howard D. Richards, Sr., Chairman of the Southern Ute Indian Tribe.

On behalf of the Tribe, I want to express our appreciation to you and Senator Campbell for your long-standing support for the Animas-La Plata Project ("ALP") and the settlement of the Tribe's water rights claims in southwest Colorado. We are grateful for the assistance you and the Committee have provided over many years. Without that support, we would be facing a long and difficult court battle to obtain the water rights to which the Southern Ute Indian Tribe is entitled. We believe that the construction of ALP and the settlement of the tribal claims through the development of additional water supplies is a much better choice for both the Tribe and its neighbors in Colorado and New Mexico. We are grateful that you both share that view and continue to work so hard to accomplish that goal.

Mr. Chairman, ALP is the heart of the settlement of the water rights claims of the Southern Ute Indian Tribe and will provide the Tribe and our sister tribe, the Ute Mountain Ute Tribe, with water to meet tribal needs, now and in the future. Since at least 1968, ALP has been a critical part of the Southern Ute Indian Tribe's plans for the future. The Tribe has always recognized that it needs a firm and reliable water supply to create the permanent homeland which the Southern Ute Indian Reservation was meant to provide. While Federal law promises Indian tribes the rights to use water to meet their present and future needs, tribes often are forced to resort to lengthy and bitter court cases to secure those rights. The recognition of tribal rights under Federal law frequently results in significant water shortages for farmers, ranchers and towns in the surrounding area. The Southern Ute Indian Tribe has always sought to secure the water supplies which it needs without

depriving our neighbors of the water supplies that they have used for many years, sometimes for many generations.

The Tribe has worked hard to make ALP and the settlement of the tribal water claims a reality. We have been fortunate to work not only with you and Senator Campbell, but also to have neighbors and State governments in New Mexico and Colorado who recognize the need for additional water supplies in southwest Colorado and northwest New Mexico, and who have fought equally hard for ALP. Our neighbors have acknowledged the validity of the tribal rights and have made many sacrifices to ensure the recognition of the Tribe's water rights and the settlement of the tribal claims. The Tribe greatly appreciates those contributions to the settlement effort and the construction of ALP.

As this hearing demonstrates, the construction of ALP is a complex and difficult task that requires the continued cooperation of many parties, as well as the Federal Government. Although our interests are not always the same, all of the parties who would benefit from the project have worked together to overcome many obstacles. Our interests have at times clashed, but we have always managed to find a solution that we could all accept. There are some issues which still must be resolved, but I am confident that we will continue to work together and continue to move forward with building and operating the project.

Both legally and practically, the construction of ALP is required to settle the tribal water rights claims on the Animas and La Plata Rivers. The average flow of the Animas River out of the State of Colorado is more than 700,000 acre-feet per year. But like most western rivers, the run-off varies greatly from year to year and takes place mostly in the springtime. Without storage, this water supply is of only limited use. Since the early part of the 1900's, parties in southwest Colorado and northwest New Mexico have sought to develop this resource to meet the needs of their communities. As a result of those efforts, ALP was authorized by Federal law in 1968.<sup>1</sup>

Until 2000, the purpose of ALP was to meet irrigation, municipal and industrial needs in the area. As structured in the late 1970's, the project was to provide water to users along the Animas River and, in addition, take water from the Animas River, store that water in Ridges Basin Reservoir, and deliver the water west into the La Plata Basin where it could be used for a number of purposes, including irrigation. When negotiations over the tribal water right claims began in the mid-1980's, the Bureau of Reclamation had completed a "final" environmental impact statement, a definite plan report and obtained clearance for the full project under the Endangered Species Act,<sup>2</sup> and other Federal environmental laws.

Under the Colorado Ute Indian Water Rights Final Settlement Agreement,<sup>3</sup> the construction of certain project facilities were required to settle the tribal claims on the Animas and La Plata Rivers. The Southern Ute Indian Tribe was to receive irrigation, municipal and industrial water supplies from the project. In addition, certain tribal agricultural delivery facilities were to be constructed. In 1988, Congress approved the Settlement Agreement and authorized the construction and use of the project as envisioned by the Settlement Agreement.<sup>4</sup> Under the Settlement Agreement and 1988 Settlement Act, the two Ute Tribes could return to court to seek recognition of their water rights if the required project facilities were not completed by January 1, 2000. Section 10 of the 1988 Settlement Act directs that the "design and construction functions of the Bureau of Reclamation with respect to the Dolores and Animas-La Plata Projects . . ." were to be "subject to the provisions" of the Indian Self-Determination and Education Assistance Act,<sup>5</sup> "to the same extent as if such functions were performed by the Bureau of Indian Affairs." The only caveat was the section would not apply if it would "detrimentally affect the construction schedules."

Throughout the 1990's, the project sponsors and Reclamation sought to begin construction of ALP but repeatedly ran into environmental problems involving the Endangered Species Act and water quality issues related to the irrigation component of the project. Following a series of public meetings over the fate of the project and the tribal water rights settlement, the Department of the Interior proposed resolving the tribal claims through the construction of a smaller project that would only serve municipal and industrial users and would reflect the depletion limits imposed on the project under the Endangered Species Act. Following the development of an-

<sup>1</sup> See 43 U.S.C. § 620.

<sup>2</sup> 16 U.S.C. §§ 1531-44.

<sup>3</sup> (Dec. 10, 1986) ("Settlement Agreement").

<sup>4</sup> Colorado Ute Indian Water Rights Settlement Act of 1988, Public Law No. 100-585 (1988) ("1988 Settlement Act").

<sup>5</sup> 25 U.S.C. §§ 450 to 458bbb-2 ("Self Determination Act") (frequently called "Public Law No. 93-638" or "638").

other environmental impact statement comparing the greatly reduced project to the non-structural alternative advanced by the project opponents, the Secretary of the Interior issued a record of decision finding, among other things, that the reduced project was the “environmentally preferred alternative” for settling the tribal claims.<sup>6</sup>

In 2000, Congress enacted the Colorado Ute Settlement Act Amendments of 2000<sup>7</sup> which authorized the settlement of the tribal claims through the construction of a smaller project that would provide the tribes and water users in Colorado and New Mexico with statutory established water allocations for municipal and industrial uses. The 2000 Amendments directed the Attorney General of the United States to file the necessary papers with the Colorado Water Court to extend the deadline by which the Tribes must return to court to secure their water rights. The Attorney General has asked the Court to extend that deadline until 2012.

The Southern Ute Indian Tribe has worked closely with the Ute Mountain Ute Tribe, Reclamation, and the other project sponsors over the past 3 years to build the smaller project.

Reclamation’s announcement last summer of the greatly increased cost estimate was a shock and a disappointment. For a variety of reasons, it is extremely important to build the project in a cost-effective and timely fashion. In particular, the failure to build the project on time would once more upset the settlement of the tribal water rights claims. It is also important that our neighbors receive project water at a reasonable cost, consistent with their expectations at the time that the 2000 Amendments were passed.

The Southern Ute Indian Tribe continues to participate on both the Project Operating Committee (“POC”) and the Project Construction Coordination Committee (“PCC”). In addition, the Tribe, through Sky Ute Sand and Gravel provides “batched” material for the construction of the project. The Southern Ute Indian Tribe has also worked with the Ute Mountain Ute Tribe on the cultural resources contract for the project. At the outset of project construction, the Southern Ute Indian Tribe, the Ute Mountain Ute Tribe, and Reclamation discussed the tasks that were required to complete the project and determined who would have the lead, who would provide input and who would provide oversight on each of those tasks. The Southern Ute Indian Tribe has not charged Reclamation for these types of planning and coordination activities under the Self-Determination Act, but has only sought reimbursement when it actually supplies a product, such as concrete, to the project.

Tribal representatives worked with Reclamation, on behalf of the Tribe, when it was developing its report to the Secretary of the Interior on the factors that resulted in the increased cost estimates. These individuals have advised me that they believe Reclamation is working diligently to correct the problems that resulted in the increased cost estimate. As you know, the project sponsors were not aware of the issues associated the increased costs until they reached the crisis stage.

In our view, Reclamation has taken two useful steps to address the basic problems that existed with regard to project management. First, Reclamation is working to improve communication with the project sponsors. This effort has focused on developing a more formal means of communication about the issues facing the project, as well as increased emphasis on the monthly meetings of the PCC. Second, Reclamation has made it clear that Rick Ehat, a construction engineer in Durango, is charged with building the project. We have been told to direct our questions and concerns in the first instance to Mr. Ehat. We are encouraged by these new procedures and hope that they will improve communication and allow those who are directly affected to work with Reclamation to ensure that the project is built on time and in a cost-efficient fashion.

I want to emphasize the complexity of the tasks that face us in reaching those goals. Not only is the actual construction of such a project very complicated, there are a number of other obligations that must be met to complete the project on time. In particular, construction of the project requires substantial environmental mitigation both in the area and on related matters such as the environmental impact statement for the operation of Navajo Dam and Reservoir. These responsibilities require Reclamation to complete various activities and to consult with other Federal and State agencies to maintain the construction schedule. Funding is also critical. Without adequate annual funding, the schedule will be delayed and the cost of the project will increase further. In short, there is much to do, but working together, I am confident that we can meet the challenges before us and complete the project and the settlement.

<sup>6</sup>Record of Decision, Animas-La Plata Project/Colorado Ute Indian Water Rights Settlement Final Supplemental Environmental Impact Statement July 2000 (Sept. 25, 2000).

<sup>7</sup>Title III of Public Law No. 106-554 (Dec. 21, 2000) (“2000 Amendments”).

Mr. Chairman, in closing, I want to emphasize the importance of ALP to the Southern Ute Indian Tribe. The Tribe wants to do whatever it can to accomplish the goals of building the project on time and in a cost-efficient manner. I would be glad to answer any questions you may have. Thank you.

Senator DOMENICI. Thank you very much. Let me just say, Mr. Chairman, it is already pretty obvious that your wish that we complete it on time cannot be done. We can keep talking about it but we already heard it cannot be done.

Now, Mr. Whiteskunk, you are next.

**STATEMENT OF SELWYN WHITESKUNK, COUNCILMAN, UTE MOUNTAIN UTE TRIBE**

Mr. WHITESKUNK. Thank you, Mr. Chairman. Honorable Chairman and members of the committee, I'd like to thank you for the opportunity to address the members of the Energy and Water Committee regarding the Animas-La Plata Project. I take very seriously the honor my tribe has given me by choosing me to represent the Mountain Ute Tribe for this hearing.

The Tribe has waited many years to see the Colorado Ute Indian Water Settlement implemented through the negotiations and ultimately the construction of the Animas-La Plata Project. The settlement passed in 1988 provided the Colorado Ute Tribes to participate in the project construction through the Indian Self Determination Education Assistance Act, Public Law 93-638. The opportunity for the Mountain Ute Tribe to utilize its construction division to undertake this major project is an example of the very reason that Congress passed the Indian Self Determination Act, to foster economic development, education, training and employment. It also gives the Ute people pride in their work, which benefits our homeland, our people and the capability of all Indian nations utilizing Public Law 93-638. Amendments to the Settlement Act were passed in the year 2000, which we began our direct role in the project development through the Cultural Resource Efforts, which were mandated prior to the construction. The Ute Mountain Ute Tribe is conducting a cultural resource investigation for the Animas-La Plata Project under Public Law 93-638, Self Determination contract.

In April, 2002, the Tribe contracted with the Bureau of Reclamation to perform these responsibilities under the terms of this contract. The Tribe is responsible for the management, cultural resource in compliance with several Federal laws, including the Archaeological Resource Protection Act, the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, also known as NAGPRA. The Tribe is working closely with 26 consulting tribes to compile the evidence affiliation that is necessary for compliance with NAGPRA.

The Cultural Resource team comprises over 50 individuals, including a six-person oversight committee consisting of a contract coordinator, a Ute Mountain Ute Tribal council member, two Southern Ute tribal members, a Bureau of Reclamation representative and an external archaeologist. Due to the experience presented by the six-person committee, everything from finances to archaeological methodology and ethnographic research is closely scrutinized and kept on track. This has allowed the cultural resource

portion of the project to progress smoothly, on budget and on schedule.

To date the Tribe has completed two of four field seasons and has excavated 50 archaeological sites. Many Native Americans are working on the Animas-La Plata Project, Cultural Resource Project, conducting excavation, laboratory analysis and learning technical specialties. Approximately 40 percent of the field crews were Native American in 2002 and 2003, and in 2004 field season numbers are expected to remain high. In addition, the Tribe has hired a Southern Ute environmental company to help recruit, hire and train Ute tribal members, some with and some without experience.

Senator DOMENICI. Mr. Whiteskunk, we are going to make your whole statement part of the record. So we would appreciate it if you would be brief.

Mr. WHITESKUNK. Yes sir. We have a Ute construction company who is doing the construction of the project, Mr. Chairman, and I have members of the company here as well to answer any of your questions if need be.

Senator DOMENICI. Are those non-Indian contractors?

Mr. WHITESKUNK. They are with tribal members. The tribe is owned by the tribe, the construction company is owned by the tribe.

Senator DOMENICI. But you have some outside contractors as part of that?

Mr. WHITESKUNK. Yes, employees.

Senator DOMENICI. What percent of the contracts, I ask either of you, are done by non-Indians?

Mr. WHITESKUNK. I would say 75 percent of the work is done by the Ute Mountain Ute Tribe, 25 percent would be non-Indian.

Senator DOMENICI. I find that very hard to believe but I do not have anything else to argue with you about. But I find that very hard to believe. This is highly technical and difficult construction and I do not know how you could do it with 75 percent Indian. You have no experience, right?

Mr. WHITESKUNK. We, the Ute Mountain Ute Tribe and its company has experiences in a lot of construction-type construction. For this project it is the first time that we've undertaken this magnitude of a project.

Senator DOMENICI. How about you, Mr. Richards?

Mr. RICHARDS. The only involvement we have as far as the Southern Ute Tribe is in respect to the cultural resources, mitigation of Animas-La Plata. I sat on the Cultural Resources.

Senator DOMENICI. You do not build anything?

Mr. RICHARDS. No, we don't. We do provide material to the project such as concrete, sand and gravel and that's our only involvement in that, the tribal.

Senator DOMENICI. All right. Mr. Whiteskunk, could you proceed?

Mr. WHITESKUNK. Yes sir. From its beginning, as the construction organization, Limited Construction Authority has successfully completed a variety of projects in the Four Corners region. The types of projects include heavy and highway construction, residential and commercial buildings, municipal improvement, oil field construction. All of these are performed on a merit shop basis with

maximum utilization of Indian laborers and craftsmen. The Ute Mountain Ute Tribe Limited Construction Authority subject to the provision of the Indian Self Determination Act is performing the construction function of the Animas-La Plata Project. To date, five separate construction contracts have been negotiated to Weeminuche Construction Authority by the Bureau of Reclamation, two of which have been successfully completed, three are on-going. Other Animas-La Plata construction components are in the process of being bid or negotiated and were comprised a majority of the project. Weeminuche Construction currently employs 170 people, nearly 100 are currently working on the Animas-La Plata Project. Native Americans comprise approximately two-thirds of this workforce. As work progresses into the summer of 2004, it is anticipated the number of people working on the project will increase substantially.

Recruitment efforts are made with Native American presence and much of the recruiting is accomplished through the Tribal Employment Rights Office of the Ute Mountain Ute Tribe and the Southern Ute Tribe. To further enhance the construction skills of the workforce the company is training a group of Native Americans as heavy equipment operators, mechanics and carpenters to work on the Animas-La Plata Project.

#### PREPARED STATEMENT

The roles of the Ute Mountain Ute Tribe and Southern Ute Tribe have played in the Cultural Resource Mitigation Project construction very simply add more significance to our water rights settlement, the history of which spans more than two decades and represents a very real cooperation between the two tribes and our non-Indian neighbors in the San Juan Basin. The commitment we have to see this settlement through the act of 2000 is equally matched by our present commitment to build this water project correctly, on time and cost effectively. Reaching this goal will be a proud moment for the Ute Mountain Ute Tribe and the Southern Ute Tribe and its people.

I thank you.

[The statement follows:]

#### PREPARED STATEMENT OF SELWYN WHITESKUNK

Mr. Chairman, Senator Campbell and members of the committee. Thank you for the opportunity to participate in this important hearing. I am honored to represent the Ute mountain Ute tribe and its members today. We have worked very hard and have waited many, many years to see the Colorado Ute Indian Water Rights Settlement implemented through the construction of the Animas-La Plata project.

The Ute Mountain Ute tribe is not a mere bystander in the implementation process. The settlement passed in 1988 provided for the Colorado Ute tribes the opportunity to participate in the project construction through the Indian Self Determination and Education Assistance Act. For the Ute Mountain Utes, this opportunity is meaningful for the very reasons Congress passed the Act:

- this project brings economic development to the tribe and its members,
- it further promotes education, training and employment among our members,
- it provides real world experiences in cooperation and management, particularly on such a large scale involving so many tribal and governmental programs,
- it promotes pride in our work and the benefit it brings to our homeland and our people. These benefits ultimately make the tribe stronger and better able to participate in its own evolution.

After amendments to the Settlement Act were passed in 2000 and the project was ordered to proceed, we immediately began our direct role in project development by

contracting the cultural resources mitigation responsibilities which must be completed prior to construction and which continue throughout the life of the project.

The Ute Mountain Ute tribe and the Southern Ute Indian tribe entered into the contract for cultural resources mitigation in 2002. The area surrounding the project is very important archaeologically in that there are thousands of artifacts, ranging primarily from 2,000 to 10,000 years old, and the area is also important to our tribes culturally in that it contains a portion of a popular route through the mountains that was used by the Ute people for generations. I am pleased to inform you that the contract has proven to be a great success in areas that are very important to the tribes:

- nearly 40 percent of all employees working on the contract are Native American, as well as our own tribal members,
- we have implemented a popular 5-week Native American training program,
- the mitigation work has coordinated very well with the construction work,
- and we have made findings of significant archaeological interest.

The Weeminuche Construction Authority plays an even larger role in the actual building of this critical water storage facility.

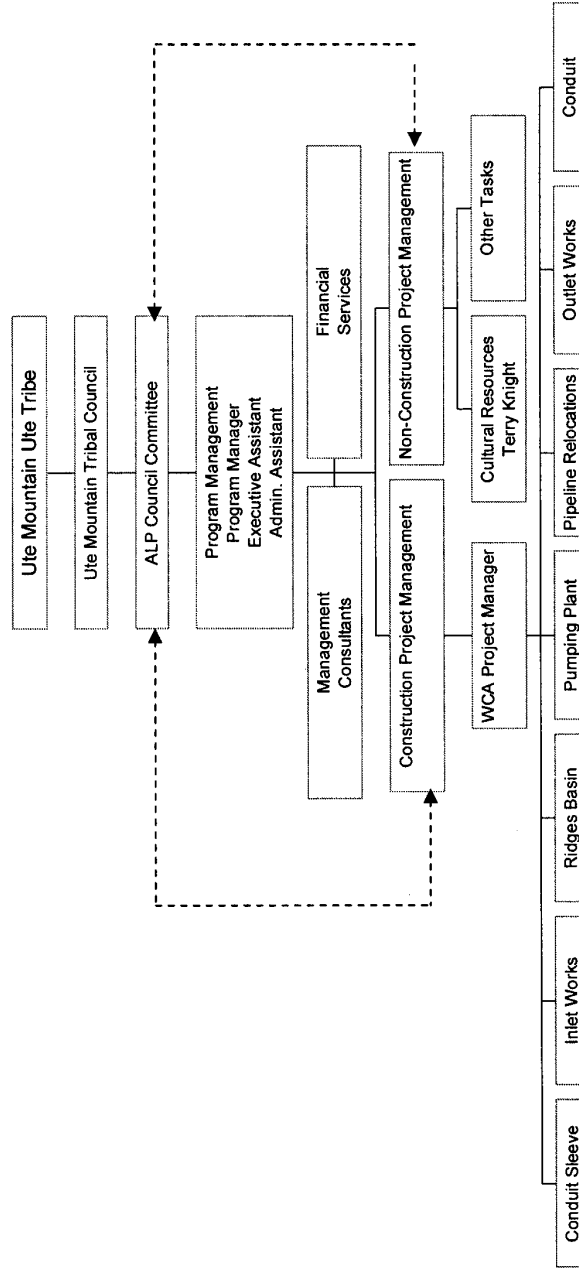
The Ute Mountain Ute tribe owns and operates its own construction company, the Weeminuche Construction Authority, and we have designated Weeminuche as the prime contractor on the construction of the project. Building a dam such as this is extremely complicated and requires a wide range of skills and expertise. We are very proud of the work Weeminuche is doing and we see many benefits in the project for our own people, and the local community. Our people are gaining hands-on experience in areas that will prove useful to them in the future. Although the opportunities for employment in construction on the project varies with the time of year and the particular contract being executed, Weeminuche generally employs about 100 people, about 67 of whom are Native American. Weeminuche also utilizes many subcontractors, many of which are local to the area.

The hands-on role the Ute Mountain Ute tribe has played in cultural resources mitigation and project construction very simply adds more significance to our Water Rights Settlement, the history of which spans more than two decades and represents very real cooperation between our two tribes and our non-Indian neighbors in the San Juan basin. The impetus behind the Act is to provide to the tribes the water they were promised, but, in the end, we sincerely hope this reservoir will help to better serve the needs of all people in the area, particularly during these times of drought and severe water shortages. We want this project to remind people forever that the Federal Government's trust responsibility to native peoples can result in great things for all people, and that by working together, local residents, tribes, local, State, and Federal governments can achieve real, tangible success.

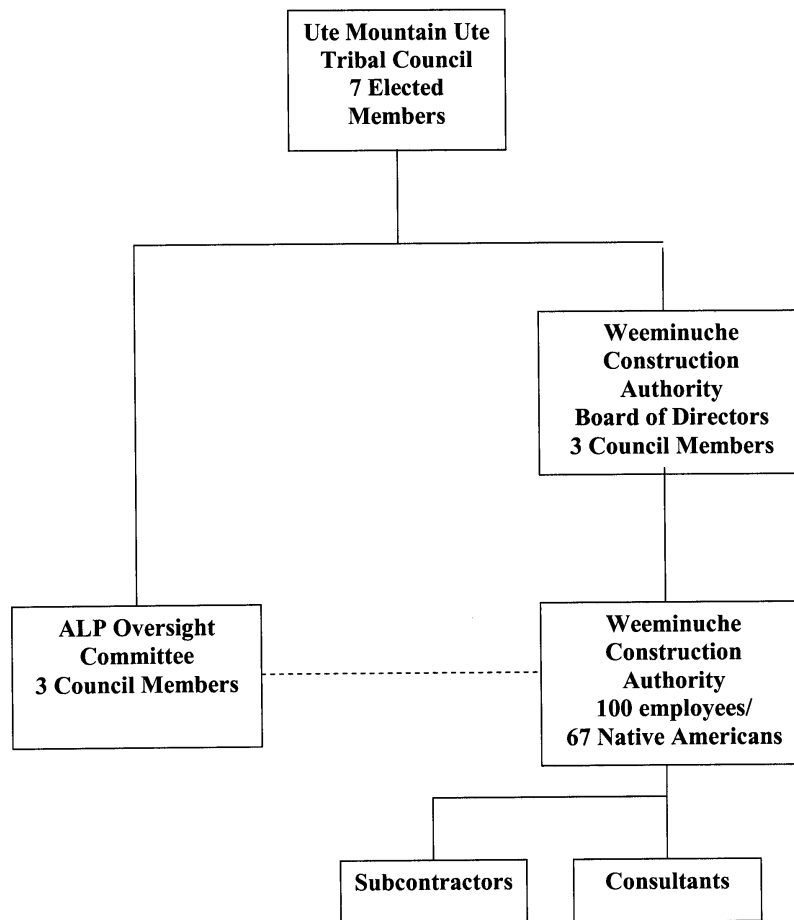
The commitment we have made to see this settlement through to the Act of 2000 is equally matched by our present commitment to build this water project correctly, on time, and cost-effectively. Reaching that goal will be a proud moment for the Ute Mountain Ute tribe, and when the reservoir is filled with the wet water we have dreamed of for so many years, our pride will shine a bright light on Ute Mountain and the entire Four Corners.

Thank you. I will be happy to respond to any questions.

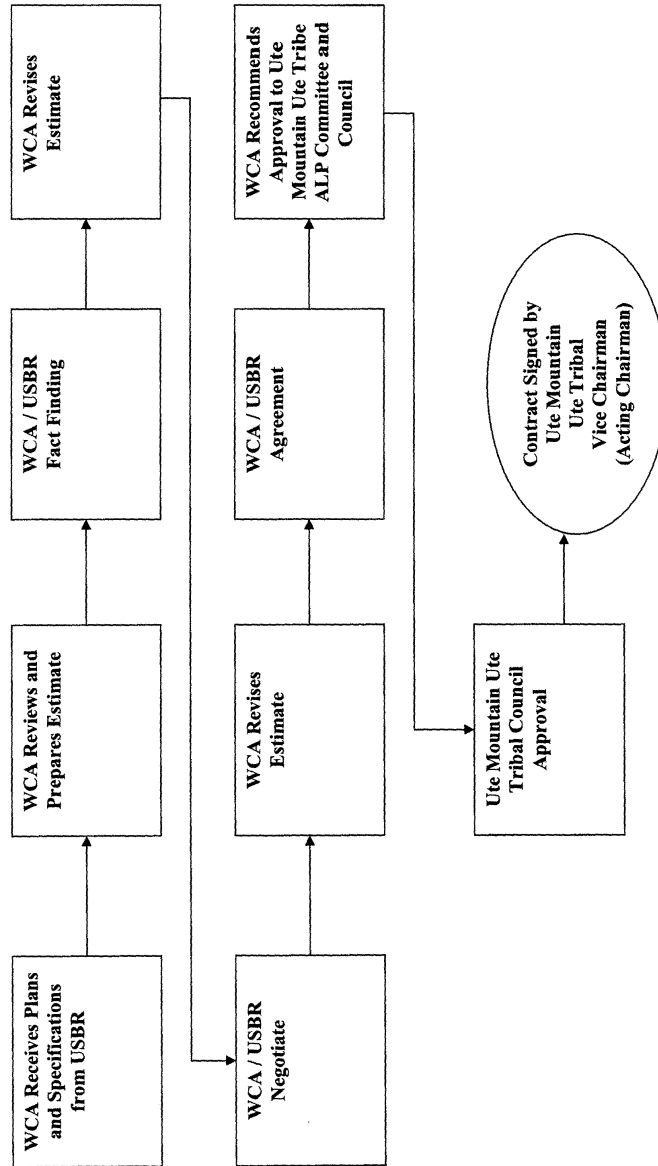
# Animas-La Plata Program Technical Services 40-19010 Task 8



**Weeminuche Construction Authority  
Animas-La Plata Project  
Organizational Chart**



# **Weeminuche Construction Authority (WCA) ALP Construction Contract Timeline**



Senator DOMENICI. Thank you. Our two next witnesses are Mr. Griswold and Mr. Kirkpatrick. I would like you to proceed in that order and make your statements part of the record and be as brief as you can.

Mr. GRISWOLD. Thank you, Mr. Chairman.

Senator DOMENICI. You are welcome.

**STATEMENT OF MIKE GRISWOLD, PRESIDENT, ANIMAS-LA PLATA  
WATER CONSERVANCY DISTRICT**

Mr. GRISWOLD. I appreciate that. I've been associated with this project for 10 years as a director of the Animas-La Plata Water Conservancy District and 6 of those years I was president. During much of the downsizing and up through 6, 7 months after our July 31 date. We measure time by that date. We believe that the Bureau doesn't want to go to the woodshed twice on this project and we think there were some mistakes made. We haven't reached complete agreement with the Bureau on some of the underlying for some of the mistakes but we think the Bureau recognizes those. And my personal opinion is that I think they were very candid in the report that they made to the Secretary. I think that they fully intend to be within that indexed \$500 million cost. I certainly hope so.

Our district represents a relatively small amount of use of water from the project, about 5 percent of the water, but we do believe that some of the costs are costs that should not be borne as reimbursable cost by our organization in paying our full and fair share of the water, such as the arrangement under 638, which we applaud, we admire that effort to assure assistance for the tribes to be able to improve their capabilities. But that isn't actually a unit construction cost, or construction unit cost, I should say, that we believe that we should be reimbursing to the Federal Government.

Let me just say this. For our users of water the resolution, the bottom line is pretty straightforward. Is the water affordable? Our two principle purchasers of water from our district are going to be, we hope, the city of Durango and a rural domestic water system for the southwestern third of our county. The price of the water is a very significant factor in their planning for feasibility. The city will not pay more than they would pay if they had to build their own storage facilities. So their possibility of expanding the amount that they pay is relatively slight. We were in the final stages of negotiation with them for this purchase when July 31 occurred. The Rural Domestic Water Distribution Company is something that is still in the future but they're going to have to get ahead of the curve if they're going to be delivering water. As a matter of fact, my successor as president of the District is a person who has to haul their domestic water for their home. There are a lot of people in our area that are in that position.

**PREPARED STATEMENT**

So we do support Resolution. I have been very encouraged about the things that I have heard, both from you and from Senator Campbell and from Secretary Raley, that by golly, we're going to binge down and really put our efforts to this and we're going to finish it in a high style. And I support that wholeheartedly.

[The statement follows:]

PREPARED STATEMENT OF MIKE GRISWOLD

Mr. Chairman, I appreciate the opportunity today to speak on behalf of the Animas-La Plata Water Conservancy District (the District). The District was formed under the Colorado law about 22 years ago to plan for and develop the water resources within our boundaries. A primary undertaking of the District has been promotion of the Animas-La Plata Project. The District also expected to be the agency to collect payments from irrigators using Animas-La Plata project water, and then to pass those funds on as repayments for construction by the Bureau of Reclamation.

I have been a Director on the District board for 10 years, and its president for the past 6 years, until I stepped down in February of 2004. During that period, a combination of environmental, financial and political concerns about the original Project's scope brought home the realization that the Project, as originally configured, would not be built in the foreseeable future. Then Secretary of the Interior Babbitt was adamant that the downsized project could not include any irrigation features. With reluctance, our District supported building a down-sized version of the ALP which will allow for the settlement of the reserved water right claims of the two Ute Indian tribes of Colorado and provide M&I water for use in our county and in San Juan County, New Mexico. The ALP, authorized by Congress in 2000 and now under construction, will also allow the Navajo Nation to receive M&I water and have it delivered from Farmington, NM to Shiprock, NM by a pipeline to be built as part of the Project.

The Bureau of Reclamation contracted the cost estimation process for the downsized project, and included those costs in the 2000 FSEIS. Our District did not participate in either the preparation or the presentation to the public of these cost estimates. We did argue, however that the "sunk costs" associated with the earlier Project's irrigation features should not be considered as a cost of the downsized Project.

The non-Indian participants in this Project have been consistent in their commitment to pay for their proportionate share of the reasonable construction costs for the three remaining Project features which are the pumping station, the conduit, and the off-stream reservoir. The 2000 Amendments provide that non-Indian participants could elect to pay their share of the construction costs up front, thereby avoiding being charged interest during construction, or they could execute repayment contracts. The District arranged to have the full amount of our share of the project costs paid out of funds available to the Colorado Water Resources and Power Development Authority (the Authority). Our share of the Bureau's construction cost was deposited by the Authority in an interest earning escrow account from which the Bureau has already made withdrawals in direct ratio to the expenditures of Federal appropriations for Project construction.

Construction officially began on November 9, 2001. Our borrowed money was at risk from that date onward, under a contract between the Bureau and the Authority. For the last 2 years, I personally represented our District at construction coordination meetings held by the Bureau. I also served on a task force which drafted agreements to be in place when construction was completed. During this time I attended almost all of the Project meetings. As several contracts were let for segments of the construction activity, we became aware that some of the price tags for these segments were higher than we expected. However, the Bureau did not have its construction activity segmented in a fashion that would permit us to easily compare cost segments in the FSEIS. I, personally, questioned the Durango Area Office director regarding the cultural resources contract the Bureau awarded, and was told that, yes, the price was higher than anticipated, but that was because it covered additional work, such as compliance with the Native American Graves Repatriation Act and other added costs resulting from a higher density of archeological sites in the Project area.

Let me emphasize at this point that the Animas-La Plata Water Conservancy District did not employ independent engineering consultants to review or oversee the work of the Bureau of Reclamation. We, as many sponsors, relied upon the Bureau's expertise in Project construction. Let me also emphasize that because we had elected to pay our share of the project costs up front, we had placed significant reliance upon our contractual agreements with the Bureau which required full consultation on Project construction decisions and which limited any further or additional payments towards Project construction costs to those which were reasonable and unforeseen. Despite the fact that there were numerous meetings of the Project Construction Committee during the period from November 2001 until July 2003, little,

if any, consultation took place. At no time were we informed that there was overall concern about the construction cost estimates against which we were operating.

As a result, we were shocked when the July 31, 2003 letter from Regional Director, Rick Gold, arrived announcing that the cost estimate for completion of the greatly reduced Animas-La Plata Project would have to be increased by approximately \$162 million. The reasons given by the Bureau for the estimated cost increase are a matter of record that I will not detail in this statement. I have read the report the Bureau prepared for the Secretary on the issue. Our District believes that report was candid, and evidenced a detailed effort to investigate and explain the reason for the cost increases. Several factors included in the report, however, did not accurately state the conditions that we believe existed at the time the 1999 estimates were made and used by the Bureau.

I will mention a few instances. The bedrock at the pumping plant site was, or should have been, known to a high degree of accuracy, as some three dozen test wells had been drilled by the Department of Energy (DOE) and monitored by, among others, the Bureau. From these test wells the Bureau had the information to accurately assess the materials to be excavated but, inexplicably did not use it. The fault line which the Bureau states required realignment of the pumping plant subsequent to cost estimating was a known feature long before the original estimate was approved by the BOR and, in fact, was cited in the 2000 FSEIS. DOE's UMTRA (Uranium Mill Tailings Recovery) team had stated, at a public meeting it conducted in Durango, that the ground water recovery on the 46 acres where the pumping plant is sited was progressing naturally, and that it did not need any special remedial treatment. Despite that statement the BOR letter suggests that another reason the reconfiguration of the pumping plant was dictated, was because of ground water recovery needs. These positions seem to be inconsistent with the facts and circumstances known at the time the project cost estimate was accepted by the Bureau. In addition, the decisions to change the pumping plant location, for whatever reason, was never the subject of consultation with the Project participants and no assessment of the potential for a change in project cost was ever performed.

There were also other design changes made without consultation with partners contrary to the payment contracts the Bureau executed with the two participating entities. For some changes limited information was shared—for instance, for the relocation of County Road 211—but these did not, in my estimation, rise to the level of consultation. We were told by the Bureau in essence, "Here is what we are doing or are going to do." More importantly, no comparison of the cost difference between alternatives was ever presented. The same circumstances occurred with regard to decisions on how and where to relocate natural gas pipelines in the Project Area.

Please be assured that in the Post-July 31 2003 era, the Bureau has devised and employed processes which specifically identify issues and changes, and sets forth a process for consultation with Project supporters. My opinion is that the increases reported in July 2003 should be, for the most part, characterized as CORRECTIONS TO THE ESTIMATES and not as COST OVERRUNS. Effectively all of the reasons for the significant increase in the project cost relate to mistakes made in the estimate that were not carefully checked by the Bureau or to changes in project design that were made by the Bureau after the estimates were prepared without adequately considering the cost consequences. Examples to support this statement include the following:

- there was only a small increase in cost for the reservoir proper, essentially for general inflation and for the cost of 638 process. The estimates for the reservoir were generally on target.
- the one facet of the reservoir construction that did change was in the nature and number of drop structures in Basin Creek between the reservoir and the confluence with the Animas River. The original cost estimates were inadequate because they included too few drop structures.
- by comparison, the errors in estimating costs for the pumping plant and conduit were horrendous. Some of the omissions were: not including an administration building; absence of pressure reduction and anti-backflow valves for the conduit (I personally asked the Bureau's lead man about this in mid-2002, and was told that they were planned.); insufficient diameter for the conduit to carry the planned capacity of the pumps, as examples.
- redesign of features after the cost estimate was prepared, such as County Road 211 changed from replacement in kind just outside the high water level to replacement high on the ridge with a road greatly improved in design standards; relocating the pumping plant and placing deep into the bedrock; changing the gas pipelines' relocation route to include boring two 36-inch diameter holes for over one-quarter of a mile, as examples.

—costs to be expected from implementation of the Indian Self Determination and Education Act (638) contracting process were not included.

—unspecified Homeland Security features, have also been added.

I would also like to address the relationship of the 638 Process to the Animas-La Plata Project. In 1988 and again in 2000, the Congress specifically directed the Bureau of Reclamation to utilize 638 procedures in constructing the Animas-La Plata Project. The congressional direction was unmistakable. The Animas-La Plata Project was to be built, to the extent feasible, utilizing resources of the Colorado Ute tribes. Even a cursory review of the underlying law makes it clear that Congress did intend to provide additional financial benefits to the Indian tribes over and above those that might be enjoyed by a non-Indian contractor. At no time has Congress suggested that these additional costs should be considered part of the reimbursable cost of the Project. In fact they are costs the Federal Government incurs in order to encourage the improvement of the economic condition of American Indian tribes generally. We, as financial contributors to and participants in the Animas-La Plata Project want to make it perfectly clear that we have no disagreement with this congressional decision so long as those costs do not become a part of our reimbursable share. We also want to be clear that we are very confident in our Indian neighbors' ability to perform the tasks necessary to build the Animas-La Plata Project for a reasonable and competitive price. There is nothing in the circumstances surrounding the construction record that exists today to suggest the tribes have benefited inappropriately from the congressional decision nor have they taken advantage of the process. In fact, the work that has been done on the Project to date has been completed in a highly professional manner and we are proud to have the tribes as our partners.

To the extent that there has been a suggestion by some that the application of the 638 Process to this Project has resulted in an increase in project costs approaching 30 percent, or that the tribes have received a largess approaching 30 percent of the project costs, we categorically disagree with any such assertions. It is our strong belief that if there are increases in the cost of the Animas-La Plata Project due to the 638 interaction, those increases will first have been sanctioned by the Congress and second that they will in all likelihood not exceed 10 percent. The tribal participation in constructing the Animas-La Plata Project is not, and should not be cited as, a major reason for the change in project costs. From our perspective, the enormous bulk of the change in project cost results from inaccurate assessments of the costs prepared for the 1999 EIS and subsequent changes in Project facilities which were made by the Bureau of Reclamation without consultation with Project supporters and without assessing the impact of the changes on ultimate project costs.

The bottom line for the Animas-La Plata Water Conservancy District and the water users which it represents is a straightforward proposition. We obtained funding from the Colorado Water Resources and Power Development Authority in order to pay upfront for the cost of the Project. The price which was paid was within the ability of our citizens to repay. Included within the group of our potential customers is the City of Durango as well as the District's own plans to construct a rural domestic water system in western La Plata County. The cost of water from the Animas-La Plata Project is the most critical element in providing both of these systems with a water supply. Any significant increase in the cost of project water over and above that already committed will seriously jeopardize the ability of either entity to continue participating. It is absolutely essential that the costs associated with constructing the Animas-La Plata Project resulting from reliance on the 638 Process and resulting from the Bureau's omissions in estimating the cost of the Project and changing project facilities without considering the cost implications should not be borne by the non-Indian Project participants.

We must find ways to keep the cost to our District within the ability of our customers to pay. I believe Commissioner Keys and the Department of the Interior are dedicated today to taking every step they can to meet this need. Our region in Colorado needs the long-term security that stored water in this project will provide. I am optimistic that it can happen. Significant progress can be made by assuring that the non-Indian participants pay for their proportion of reasonable construction costs but that costs for other purposes be appropriately assigned elsewhere.

We continue to support the completion of the project. We support the overall goal of meeting the treaty commitments to the Colorado Ute tribes to provide a reliable supply of water for their present and future needs, a promise dating from 1868. We support the Bureau in continuing a well-reasoned use of the 638 process with the tribes in constructing this project. We support fiscally responsible cost allocations. We stand ready to support the mutual goals shared by our Native American friends,

the San Juan Water Commission of New Mexico, the State of Colorado, and the Bureau of Reclamation, all in a well functioning partnership.

And we thank this subcommittee for its dedication to these goals.

Senator DOMENICI. Thank you very much.

**STATEMENT OF L. RANDY KIRKPATRICK, EXECUTIVE DIRECTOR, SAN JUAN WATER COMMISSION**

Mr. KIRKPATRICK. Senator Domenici, I want to thank you for the opportunity to come before you and I appreciate you incorporating my testimony in that effort. I will try to keep my comments as short as possible.

I want to thank you for what I heard from you and Senator Campbell regarding the holding down of our costs. The only one that we're still concerned, it was brought up earlier this morning was the concern about the extended construction time and how those costs will be allocated as well. We're very concerned that they could push the cost of this project beyond our ability to pay.

Senator DOMENICI. I agree with you. That is a very serious problem.

Mr. KIRKPATRICK. The second part that I would like to address this morning before I close is, we have been very concerned with the willingness of the Bureau of Reclamation to comply with the existing contract between the San Juan Water Commission and the Bureau of Reclamation. It is the opinion of the Commission that we would have avoided some of these problems had they fully consulted and informed us of these changes and we would encourage you to urge their coming to settlement on that. We see improvement but we have not seen full compliance at this point.

**PREPARED STATEMENT**

And to shorten my thing as slow as I can I would like to make one final comment here. Despite the issues we raised in our written testimony we still feel it is appropriate that the Bureau of Reclamation and Weeminuche Construction Company continue construction of this project, and feel that it would be very shortsighted to change horses in the middle of the road on the construction. They are coming up to standard and doing a very good job, an excellent team.

[The statement follows:]

**PREPARED STATEMENT OF L. RANDY KIRKPATRICK**

Thank you for the opportunity to testify in this important hearing today. Before I begin, I would like to introduce to you the Chairman of the San Juan Water Commission, Mark Duncan.

Today I want to address two points that are important to the San Juan Water Commission and the State of New Mexico. They are: (1) the Bureau of Reclamation's management of the Animas-La Plata Project and (2) cost reimbursement.

However, I want you to know that despite the concerns I am raising today, the San Juan Water Commission remains committed to the completion of the Project. The Project is now under way, and it must be completed and put into operation. The Project and the water storage it will provide for New Mexico are critical to the future of the northwest part of the State. Further, the Bureau of Reclamation remains the best agency to complete the project—their construction team is excellent. The Bureau is working diligently to manage the construction, and it would be foolhardy—not to mention expensive and time-consuming—to change the construction team now.

## INTRODUCTION—BACKGROUND

The San Juan Water Commission (“SJWC” or the “Commission”) is a New Mexico joint powers organization, and it is composed of representatives of the San Juan Rural Water Users Association, San Juan County, and the Cities of Aztec, Bloomfield and Farmington. These entities collectively provide Municipal and Industrial water to more than 110,000 people, including many people on the Navajo Nation. The SJWC was the first entity to contract with the Bureau of Reclamation (“BOR” or “Bureau”) for storage in the Animas-La Plata Project (“the Project”), as required in the authorizing legislation. We at the SJWC have paid up front our share of the cost of the Project as originally estimated by the BOR, or \$6.9 million. We have advanced funds pursuant to our contract from an escrow account as requested, based on the BOR’s invoices.

The SJWC was shocked and dismayed to learn of the Bureau’s extreme cost underestimate on July 31, 2003. We attempted to understand the basis for our money advances and the cost of the construction contracts since construction began, but we frankly had little success obtaining the information we requested from the Bureau. Although apparently we were asking the right questions at the right time, we did not anticipate the magnitude of the Bureau’s underestimate.

It appears that the old construction estimate, which formed the basis of our contract and our \$6.9 million payment, was incomplete. Apparently, the estimate was not a construction-level estimate, but rather was based only on an appraisal- or feasibility-level study. Further, the Bureau made changes to the Project that added significant costs. These two factors—an incomplete estimate and design changes—significantly contributed to the great disparity between the original cost estimate and the new cost estimate. The third significant factor contributing to the disparity between the two cost estimates is the use of the Indian Self-Determination and Education Assistance Act (Public Law 93–638) (the “638 process”), which the Bureau has interpreted to require the use of sole-source contracting for the construction of the Project, as well as to require the training and supervision of Indian contractors, often at significant expense. Additionally, the Bureau has maintained and increased its own non-contract staffing inconsistent with the spirit of the 638 process.

The first information the Project sponsors received concerning increased costs was the letter dated July 31, 2003, from Rick Gold, the Bureau’s regional director in Salt Lake City. This letter was released to the media the same day. The July 31 letter shocked the SJWC, and it unfairly placed much of the blame for the cost estimate differences on the Ute Mountain Ute Tribe (“UMUT”), which is the primary 638 contractor and whose consultant developed the old cost estimate. Although the letter threatened to split the sponsors, we agreed to continue to work together and to support continued appropriations for the Project.

In response to this unexpected bombshell, the SJWC prepared a report about how and why the mistakes were made in preparing the original cost estimate, which is attached. As we acknowledged in our report, the BOR must make some significant changes in the way it does business in order to regain our confidence and to maintain our support for the Project. Much to the credit of John Keys, Bill Rinne and Rick Gold, some progress has been made since July 31, but more remains to be done. Following are the two areas in which changes must still be made: the Bureau’s operations and the SJWC’s reimbursement obligations.

*The Bureau must continue to change the way it is managing the Animas-La Plata Project.*—First and foremost, the Bureau must staff the Project with people who have the construction experience and project management judgment necessary to complete the Project. The Bureau has made these modifications for the construction phase of the project, and it is a welcome change.

Second, the Project Construction Coordination Committee meetings must comply with contractual obligations. This is a very challenging but necessary task, and we appreciate the Bureau’s efforts to change the structure and content of the meetings. Although the consultation function of the committee is difficult, it is necessary because it is mandated in Article 4(a) of our contract with the Bureau. Incorporating consultation with us into their process has been difficult for Bureau officials, and we appreciate the structural changes that have been made. However, a full, satisfactory consultation process has not yet been put into place.

*Issues regarding the cost of the Project and the SJWC’s reimbursement obligations must be resolved.*—Bureau officials have told us about their internal efforts to allocate costs in a way that is equitable. However, although we appreciate what the Bureau has told us, we need to review the Bureau’s final cost allocations in order to determine whether they are equitable to the San Juan Water Commission. In addition, we believe some of the measures listed below must be implemented to ensure that the increased construction costs are fairly allocated. It is simply too early to

tell whether the Bureau will incorporate these measures, but we do not doubt the sincerity of the people we have worked with most closely—John Keys, Bill Rinne and Rick Gold.

First, the Bureau must develop a cost-tracking procedure to prevent the underestimates and mistakes that have occurred from happening again. Such a process is under development, and time will tell whether it is successful.

Second, Bureau staff (and staff costs) must be reviewed and reduced. As part of this evaluation, Bureau and tribal staffing must be visible to the project sponsors and to the public. In fact, the UMUT's contract with the Bureau addresses the need to examine Bureau staffing directly, but we understand that this information has not been provided to the Tribe. The Master Contract for General Provisions for Self-Determination Construction Contracts for the ALP, October 22, 2002, states:

"M. Design and Construction Management Expenditures. In order to reduce project costs associated with 638 undertakings, Reclamation agrees to implement its design and construction management responsibilities in the most economical and efficient manner possible. Reclamation will provide to the Contractor [WCA], in writing, its work plans, which lay out planned staffing, projected level of effort required to carry out these responsibilities, and proposed expenditures."

As of November 2003, counsel for the UMUT had not received any such information from the Bureau. At the recent Project Construction Coordination meetings, the Bureau has explained some of the inner-workings of the Bureau and how costs are charged to the Project. The Bureau, however, must still link its costs to specific 638 functions. We understand that the 638 process is being used here in a novel way, and we have a need to know how much it is costing and why.

Third, the Bureau must continue to review the 638 process. Such review is ongoing, and the 638 process appears to be improving in efficiency and cost control. The Colorado Ute Indian Water Rights Settlement Act of 1988 (Public Law 100-585) requires the use of the 638 process in the design and construction functions of the Bureau with respect to the ALP. However, the legislation does not direct exactly how the 638 process will be used. Because this process is still developing, it is imperative that all 638 costs be visible and reviewable.

Fourth, all sponsors, including SJWC, must have a role in future contracts between the UMUT's construction company and the Bureau. Such participation would give us more comfort with the process and enable us to tell our taxpayers that the Federal Government and Indian contractors are working hard to hold down costs between the Bureau and the tribal construction company. We understand that the contract negotiations have been hard-hitting and have resulted in lower costs, but we need to see this process for ourselves.

Fifth, the cost of the 638 process, including costs incurred by the BOR, should not be reimbursable by the non-Tribal sponsors. The 638 process represents a Federal policy choice to help Indians gain skills and experience on government jobs. That Federal policy choice should not be implemented in a way that increases costs to the non-Indian cost-share partners in the Project, including the Commission. Such costs should be non-reimbursable.

Finally, the Commission's contract specifically states that the SJWC can be assessed additional costs only if those costs are "reasonable and unforeseen costs associated with Project construction as determined by the Secretary in consultation with the Commission." Article 8(d). The Bureau's mistakes in the original cost estimates should not be considered "reasonable and unforeseen" additional costs because they resulted from decisions that the Bureau made without consultation with the SJWC.

Moreover, the definition of "reasonable and unforeseen" costs (still to be determined) should not include costs resulting from design changes the Bureau made after the SJWC executed its contract with the Bureau. For example, the Bureau made a decision to relocate the pumping plant, in part, because of the presence of a fault line and potential contamination from an old mining site. The Bureau did not advise the SJWC when it was considering this change, or consult with the SJWC or other sponsors. The costs associated with this change should not be attributable to the joint costs for which the SJWC is responsible because the SJWC paid its upfront \$6.9 million payment in good faith and under a contract that requires consultation on "final plans for Project Works, project completion schedule, and Project construction costs." [Article 4(a)] In effect, the Bureau has not fulfilled its contractual obligations to the SJWC regarding this and many other changes, and the SJWC should not be forced to pay for such expenses. The Bureau's contract with the State of Colorado for the Animas-La Plata Conservancy District has similar language.

Thank you again for the opportunity to present this testimony today, and thank you for your interest in this important issue. Please feel free to contact me if you have any additional questions.

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MEMORANDUM

TO: San Juan Water Commission  
 FROM: L. Randy Kirkpatrick and Staff  
 DATE: November 19, 2003  
 RE: ALP Cost Increases

This briefing paper reviews the process that led up to the Bureau of Reclamation's ("Bureau") announcement on July 31, 2003, that it had underestimated the cost of construction of the Animas-La Plata Project ("ALP") by more than \$163 million. While we attempted to grasp the full extent, there may be additional information that changes these findings. It also will suggest changes that should be put into place to prevent this from occurring again and to make the San Juan Water Commission (Commission) whole. The increases in the Navajo/Shiprock pipeline are not addressed since they are not reimbursable by the Commission.

The information in this paper is based on limited information and documents obtained from the Bureau before August 21, 2003, and from a meeting with Bureau officials in Durango on August 27, 2003 (outside of the review team process), and from independent analysis of Bureau documents. This report does not in any way draw on information obtained from the Bureau during the preparation of its report to the Secretary.

The construction cost estimate the Bureau used in the 2004 Budget Justification documents was \$336.9 million at the January 2003 price level—this estimate (the "old estimate") was based on a cost estimate developed for the Final Supplemental Environmental Impact Statement ("FSEIS") in 1999 and indexed up. The new construction cost estimate, at the January 2003 price level, is \$500 million (which is now estimated by indexing, in October 2004 dollars, at approximately \$517 million), and it was developed independently, from the ground up, by the Bureau beginning in January 2003. One way to understand why the cost estimates are so far apart is to trace the development of the old estimate from 1999 to the present, and to trace the changes in the project since 1999.

The Commission relied on the Bureau in the design and estimating of the project. In the preparation of this report the Commission engaged the services of professional consultants to review the Bureau's work and develop this report.

In essence, it appears that the old estimate was incomplete because it was generally at an appraisal or feasibility level only, not construction-level estimates, and that the Bureau made changes to the project that added significant costs. These two factors—an incomplete estimate and design changes—significantly contribute to the great disparity between the old estimate and the new estimate. The third significant factor contributing to the disparity is the use of the 638 process, which the Bureau has interpreted as requiring the use of sole-source contracting for the construction of the project, as well as requiring the training and supervision of Indian contractors, often at great expense. Additionally, the Bureau has maintained and increased its own non-contract staffing inconsistent with the spirit of the 638 process.

*A. Development of the Old and New Estimates, and How the Sponsors Were Informed*

The cost estimates in the FSEIS that were used to support the ALP and the legislation passed in 2000 were based on 1985 estimates from a feasibility study, and then indexed upward for inflation in 1993 and 1999. They have since been indexed up to 2003.

The estimates were never more than feasibility level estimates. They may have been at the lower appraisal level for some items. The estimates included some mistakes in estimating the volume of material to be excavated and in some unit prices. The Bureau changes to certain features were made without considering the increased costs or consulting with all the sponsors. The Bureau supplied most of the information used by the Ute Mountain Ute Tribe's ("UMUT") consultant to develop the estimates.

Construction management in the 1999 estimate was at a level of 12 percent; more typical of BOR projects is 15 percent, which is where it is in the new estimate.

Normally, on any Bureau project, before construction begins on individual features, the Bureau will prepare construction cost estimates. That has not been done on this project.

In early 2003, the Bureau began an independent cost estimate for ALP. The Bureau's rule (and OMB's rule) only allows cost indexing for 5 years before a new estimate is made. This new estimate was from scratch and was not an updating of previous costs. It was done with the Bureau's Technical Service Center in Denver.

About June 1, all the costs began to come together and it seemed clear that a huge difference was likely.

When Bureau management became aware of the magnitude (they expected a \$30 million to \$50 million increase), they were embarrassed and set out to determine where the differences were. Rick Ehat, the Construction Engineer on the project, outlined the differences in the "Construction Cost Estimate Variances" document, dated August 6, 2003, which is attached for your review. Also attached are two spreadsheets that detail the old estimate, entitled "A-LP Construction Cost Estimate, April 2002," and the new estimate, entitled "A-LP Construction Cost Estimate, Draft #3K—Updated as of 7/29/03." The Bureau provided these documents at a meeting with project sponsors on August 7, 2003.

The project sponsors were not advised of the new cost estimate prior to its public release.

The first information the project sponsors received was the July 31 letter from Rick Gold, regional director in Salt Lake City. This letter was released to the media the same day.

The July 31 letter shocked the project sponsors, and it unfairly placed much of the blame for the cost estimate differences on the UMUT, which is the primary 638 contractor and whose consultant developed the old estimate. It threatened to split the sponsors, but they agreed on August 14, 2003 to continue to work together and to support the current appropriation for the ALP.

Also on July 31, Secretary Norton sent a memo to John Keys, through Bennett Raley, that she wanted a report by September 2 on the procedures that caused the problem and recommendations for improvements. Bill Rinne, Deputy Commissioner, is in charge of the review and report. Project sponsors have participated in the review process by commenting on drafts of the report. Project sponsors agreed to a non-disclosure agreement to protect the information generated by the review effort until the report is released. As of this writing (November 19, 2003), the report has not been released.

On August 1, 2003, the San Juan Water Commission sent a letter (attached) to Rick Gold asking for specific information on the cost estimates and confirmation that the July 31 letter did not constitute any formal notice that construction costs have increased, which could immediately increase the cost to the Commission.

On August 7, 2003, a small group from the project sponsors met with the Bureau. The presentation was nothing like the July 31 letter. The group expressed the deep sense of betrayal caused by the letter. The letter appeared to be purely a CYA action and put the sponsors, especially the Utes, in a terrible position. The group urged the Bureau to take responsibility.

On August 13, 2003, Rick Gold sent a follow-up letter to Harold Cuthair (attached) in which he apologized for blaming the UMUT. But the letter failed to address what role design changes played in increasing the costs. It also did not retract the cost increases laid at the feet of the UMUT.

On August 14, 2003, sponsors met to hear the attendees from the August 7, 2003 meeting communicate their understanding issues (which forms much of the basis of the report). Additionally, the group recognized the need to continue construction activities and appropriation efforts, while evaluating the impacts of the estimates and the appropriate responses, including the possibility of litigation.

On August 15, 2003, the Commission sent a follow-up letter to Rick Gold (attached) that listed the information received. At that point, the Bureau had supplied information in only three of eight categories requested.

On August 20, 2003, the Commission sent a letter to Pat Schumacher (attached) confirming that no formal notice has been issued raising the cost to the Commission. The Bureau has formally acknowledged this by letter August 26, 2003 (attached).

#### *B. Design Changes That Increased the Costs*

The Bureau made several significant design changes after 1999 that were not reflected in the old estimate as it was "updated" each year by indexing. The Bureau did not consult with Commission on the changes.

The Commission's contract, negotiated in 2001, has a specific requirement that the Bureau involve the sponsors in significant construction and design decisions:

"The Project Construction Coordination Committee will be made up of representatives of those entities that have been identified by the Settlement Act, as amended, to receive a water allocation and the Bureau of Reclamation. This committee will provide coordination and consultation on the construction activities among all the

project beneficiaries, seeking common understanding and consensus on decisions associated with such items as final plans for Project Works, project construction completion schedule, and Project construction costs.”

Article 4(a) of Contract between the Bureau and the Commission, finalized in February 2002. The Bureau’s contract with the State of Colorado on behalf of the ALP District has similar language.

The first meeting of the Project Construction Coordination Committee (“PCC”) in early 2002 did not review the costs associated with changes that had been made up to that point in designs for the project. The PCC meetings, which were monthly and open to the public, did not raise any issue for consultation or discussion among the committee members. Recognizing the shortcomings of these meetings, the Commission began trying to monitor the costs of the ALP through “contract compliance” meetings. Even so, the Commission still had trouble getting concrete information on aspects of the project.

Some of the design changes that had the biggest impact involve the pumping plant. It was turned 90 degrees so that it is perpendicular to the Animas River instead of parallel to it. The Bureau made this change to meet environmental requirements related to the uranium tailings pile that is on the river bank. However, the Bureau “sold” the change as a design enhancement and aesthetic improvement. The resulting cost increase, however, is staggering—the new plant is about \$40 million more than the pumping plant described in the old estimate. Part of the increased cost results from turning the plant 90 degrees. Also, the earlier design missed the elevation of the plant, and it must be put lower in the ground (and rock). Also, the new design eliminated some office space, and so a new O&M building (costing \$2.5 million) must be added.

Another significant design change was the relocation of the natural gas pipelines that go through Ridges Basin. In the old estimate, the lines were to be relocated around the southern side of the reservoir. Then the Bureau, for uncertain reasons, decided to relocate them around the north end of the reservoir, which required using horizontal drilling, at a much higher cost, and making other costly changes to the inlet conduit; e.g., going deeper into rock to build a sleeve to run the conduit through.

The Bureau also upgraded the replacement of County Road 211, without any Commission input. The old estimate accounted for moving and replacing CR 211 at its existing condition, a marginal gravel road. The Bureau upgraded the road and made other changes that increase the cost by about \$10 million. The Commission asked to participate in the process that the Bureau had in negotiating with La Plata County about the road, but was not invited.

Jerry Knight, Ute Mountain Ute cultural resources on August 14, 2003, said that they knew the estimates were wrong for the cultural resources program when they began the work. The BOR changed the design, and the budget was inadequate. This occurred in late 2001, but the official cost estimates were not changed. Nor were the redesign changes a subject brought to the ALP sponsors for consultation.

The Commission’s contract specifically states that it can only be assessed additional costs if they are “reasonable and unforeseen costs associated with Project construction as determined by the Secretary in consultation with the Commission.” Article 8(d). The Bureaus’ mistakes in the cost estimates should not be considered “reasonable and unforeseen.”

### *C. Use of 638 Process Raises Costs for Construction and Administration*

The Colorado Ute Indian Water Rights Settlement Act of 1988 (Public Law 100–585) requires the use of the Indian Self-Determination and Education Assistance Act (Public Law 93–638) in the design and construction functions of the Bureau with respect to the ALP.

However, the legislation did not direct exactly how the 638 process would be used. The UMUT concedes that its start-up as construction manager was not efficient, and that it spent money on gearing up. The Bureau, however, has been much less forthcoming in how the 638 process affects the Bureau’s non-contract costs in the Project.

The construction engineer convinced the UMUT to hire experts in dam construction to help the tribe learn the business. He was concerned that the Weeminuche Construction Authority (“WCA”) was not prepared to handle the project without these consultants. He said WCA is a road contractor, and not a dam contractor, which makes a big difference. Those costs apparently have been attributed to the project, but non-Indian project sponsors were not consulted or even advised before the experts were hired. In the case of the Pumping Plant, the Bureau determined that the WCA could not perform the design work and declined to have the WCA take over that part of the project.

The Bureau appears to have kept a number of employees on the payroll who duplicate the UMUT construction management and WCA work. The Commission, even after repeated requests and several meetings, has not been able to get the information that would explain duplicative work by the Bureau. The Bureau did not address this aspect of 638 contracting at all in its July 31 letter.

However, the UMUT's contract with the Bureau addresses the issue directly. The Master Contract for General Provisions for Self-Determination Construction Contracts for the ALP, October 22, 2002, states:

"M. Design and Construction Management Expenditures. In order to reduce project costs associated with 638 undertakings, Reclamation agrees to implement its design and construction management responsibilities in the most economical and efficient manner possible. Reclamation will provide to the Contractor [WCA], in writing, its work plans, which lay out planned staffing, projected level of effort required to carry out these responsibilities, and proposed expenditures."

Council for the UMUT says they've never received any of this.

The 638 contracting process operates much like a sole-source contract. As a result, the final contract prices may be significantly higher than they would be in the normal competitive bid process.

The 638 process represents a Federal policy choice to help Indians gain skills and experience on government jobs. That policy choice should not be implemented in a way that increases costs to the non-Indian cost-share partners in the ALP. Such cost should be non-reimbursable.

#### *D. Role of the Culture of the Bureau in This Process*

The Bureau staff in the chain of command that managed the ALP is fairly skilled in dealing with the public, the environmentalists and the local politics. That staff was woefully unprepared, however, for managing the construction of the ALP in partnership with the sponsors.

The Bureau's culture has changed significantly in the last 20 years, and so it is understandable, but not excusable, that appraisal level estimates would be used after they were included in the FSEIS and never reviewed critically again. The emphasis after 1999 was on environmental compliance and placating the local opponents. But no one in the Bureau looked hard at the cost estimates.

Construction managers were not brought into estimate the costs in the project at the contracting stage in early 2001, when it would have been appropriate. Construction managers were finally brought in to Durango in early 2002. The real construction managers are the ones who realized the cost estimates had no connection with reality.

More distressing, the "new" Bureau staffers seem intent on protecting their positions, instead of coming clean about the mistakes made and the failures in personnel. In short, the Commissioners cannot trust many of the Bureau staff that they had put their confidence in before. It remains to be seen if the Bureau will honestly evaluate itself in the report to the Secretary, but that is a very hard task for any organization.

The Commission is concerned that as the ALP moves forward, the Bureau must put in charge people who can be trusted. That does not include many of the current people in the old chain of command. Their culture is the "new" Bureau, and the ALP now needs old line, hard-headed construction experts.

#### *E. Suggestions for Addressing the Problems*

The Bureau must be staffed with people with the construction experience and project management judgment necessary to complete the project.

The Bureau must be a real partner with the Commission and other sponsors.

The Project Construction Coordination Committee meetings must comply with contractual obligations, such as consulting with the sponsors prior to decisions affecting construction.

The Bureau must develop a cost-tracking procedure to prevent the mistakes that have occurred from happening again.

The Bureau must revisit the 638 process to determine if other tasks may be beyond the resources of the Tribes, such as it did with the pumping plant. The Bureau must evaluate the duplication of activities involved in the 638 process and eliminate them.

The San Juan Water Commission must have a role in the development of agreements between the Bureau and WCA on future contracts.

Bureau and tribal staffing, and costs for 638 contracts must be visible to the project sponsors and to the public.

Bureau staff must be reduced in the organizational chart.

The Commission must be charged only with additional costs that are "reasonable and unforeseen," meaning that it must not be charged with the increased costs of mistakes and decisions made by the Bureau without consultation with the Commission and the 638 process.

The Congress should reaffirm its commitment to the Animas-La Plata Project and support continuing appropriations that will permit the project to be completed consistent with the Colorado Ute Amendments of 2000.

Senator DOMENICI. Well, the thing that bothers me with reference to Mr. Griswold and you saying that, you know, they have made these great commitments and they sure sound good and they are redone the way they have done in the past and now they are really on the ball, the thing that bothers me is why we should believe that? Why should we believe that when there has been a mess up of this proportion in the past?

Mr. KIRKPATRICK. Mr. Chairman with all due respect to the Bureau, I am very concerned that they will fulfill what they have suggested at this point to solve the problem. But we have seen very strong improvements, particularly in the area of construction, of how the Bureau is managing this project for the period of construction.

Senator DOMENICI. How about you, Mr. Griswold?

Mr. GRISWOLD. There has been considerable change in communications and sharing of information, an early warning system for changes that would make us aware of them, so I have a greatly improved confidence.

Senator DOMENICI. Chairman Richards, I want you to know and I want Mr. Whiteskunk to know that we understand why this agreement was a good thing. And we think you were very prudent in saying we are not going to get as a good a deal if we go to court and win. Much less, there is a chance you would not get everything you take to court. But I do want to tell you that I am very concerned about overruns that might be caused by 638. And you know, we are here now saying we want the Bureau to do better. I think we cannot leave here without saying to you, Indian participation, that you have got to do better. You cannot be part of overruns. They did not account for all this but it is pretty much money and you have got to either be better at it or you have got to call to the attention of the Bureau what kinds of problems you are having that caused the increase.

Mr. Whiteskunk, I am very sympathetic to how much you have to put together with reference to the Federal laws. Tremendously complicated and certainly, when you told us the scope of participation, you know, it is a wonder that you can get anything done. The way you are doing it, I am narrowing it down to some leaders, is probably the only way. And we hope that when you have finished all those people, the 26 that had been on the periphery, will think that what you have done is right. And I would be very careful, and I would have good lawyers. I would include in your estimates to the Bureau that you have got to have good lawyers because when we did this there were people who did not want us to do that. You know that. And they are tough. And they file lawsuits. And they love that. So you have to be in a good position, both of you in your tribes, to defend your interests and the interests that you have complied with these things like archaeological, which you told us about. They are important. In my opinion they could still stop this

project. So I do not know if you wanted any opinion from me but I tend to think it is my job and I am going to have to approve this. You do not know it but I wear two hats. I do not necessarily like it when it comes to water because we always get under funded. But I have to appropriate the money in this other committee. So we could sit up here and gab but then over here comes the appropriations bill and they do not put in enough money to get the job done. Now, I cannot do anything about that. That is OMB and by the time it gets to me it is all finished. So we are going to have to watch it next year and the year after. And you are, too, when you make your plea to OMB that they give us enough money. Because if this thing falls apart the Federal Government has a pretty big obligation and it is going to mess up a lot of water users. That is why we made the deal, right?

Mr. KIRKPATRICK. That's correct.

Senator DOMENICI. The deal was not made because we wanted to be nice. The deal was made because you looked at it, said, "If we have to spend time with lawyers and go through all these courts we are apt to be here 20 years and we do not know what is going to happen."

You know, we have a case in New Mexico, you might not have heard of it, with the Indians fighting the non-Indians and it is called the *Amont* case. A-M-O-N-T. It is 40 years old. Now, you know, you are an old man but 40 years is more than half your life. And we have not fixed it. But I am trying. And you think that I can continue that in court? If it has not worked for 40 why would I think that it would work in 50? So we have to negotiate, right?

Mr. KIRKPATRICK. That's correct.

Senator DOMENICI. There is no way out. And people that are non-Indians do not like Indians who get everything. You know, they look at it and say they got too much, we did not get anything. So I have to find out how to give them something. Right?

Mr. KIRKPATRICK. That's correct.

Senator DOMENICI. And the Indians are not going to object, they just want to get what they want. Right? That is what you are doing.

Mr. KIRKPATRICK. Right.

Senator DOMENICI. Now, let me ask my San Juan County friend. How much is the current estimate of the overage that you would have to pay if we do not fix this, if we do not fix the cost?

Mr. KIRKPATRICK. The best number, and I don't have a good and somewhat unlike Bennett, probably would increase our cost about \$3.8 million at this time, versus about \$7 million.

Senator DOMENICI. What is the baseline on what you are adding that to?

Mr. KIRKPATRICK. We would be adding that to approximately \$7 million.

Senator DOMENICI. That is a big increase.

Mr. KIRKPATRICK. Yes, it is.

Senator DOMENICI. We have got to get that fixed. And Mr. Griswold, you have a big problem, too. How much is yours?

Mr. GRISWOLD. Our investment right now is about \$7.3 million and we figure it would go up 50 percent.

Senator DOMENICI. Okay. So we are not talking about lots of money. How many districts are there? Two.

Mr. KIRKPATRICK. Actually there will be three. There will be another district in New Mexico that will be forced to pay additional funds.

Senator DOMENICI. Where is that one?

Mr. KIRKPATRICK. That would be the La Plata Conservancy District. Stella Montoya, you know Stella, I know very well.

Senator DOMENICI. All right. Well, we want a message to get out to them if you will give it to them, that we are trying to work out some way that that is included in the cost.

Mr. KIRKPATRICK. We would be glad to do so.

#### ADDITIONAL SUBMITTED STATEMENTS

[CLERK'S NOTE.—The following statements were submitted for inclusion in the record.]

#### PREPARED STATEMENT OF JOHN R. D'ANTONIO, JR., STATE ENGINEER, NEW MEXICO

Mr. Chairman and members of the subcommittee, thank you for the opportunity to submit testimony at this hearing on the Animas-La Plata Project. New Mexico has for many years supported an Animas-La Plata Project that would provide storage of Animas River flows to meet the needs of water users in New Mexico. Also, New Mexico has supported the Colorado Ute Indian Water Rights Settlement Act of 1988 as well as amendments to the Act enacted by the Congress in 2000.

It is very important, not only to New Mexico water users but to all water users of the San Juan River system, that storage of Animas River flows be provided to make the water supply available from the San Juan River system usable for development of the water apportioned to the States of Colorado and New Mexico by the Upper Colorado River Basin Compact. Further, the storage and regulation of Animas River flows in concert with the regulation afforded by Navajo Reservoir on the main stem of the San Juan River above the mouth of the Animas River will enhance the success of the San Juan River Basin Recovery Implementation Program to achieve its goals to conserve endangered fish species and to proceed with water development in the basin. An example of current development of the basin water supply is the proposed Navajo-Gallup Municipal Water Supply Project in New Mexico, currently under consideration, which is much needed to provide domestic water supplies to Navajo Indian communities and to the City of Gallup, New Mexico.

It is our understanding that construction of the Animas-La Plata Project facilities is currently progressing satisfactorily. I urge that funding be provided up to the full capability of the Bureau of Reclamation in order that the project be completed as soon as is reasonably possible. Concern has arisen over the recent release of the revised cost estimate for the project which resulted in a cost increase estimated to be \$160 million.

The local entities are very concerned that this cost increase will affect their timely re-payment of project costs to complete the project works. I believe that Reclamation should carefully review the causes of the increase looking towards alleviating any increase in the repayment of project costs.

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#### PREPARED STATEMENT OF PHIL DOE, CHAIR, CITIZENS PROGRESSIVE ALLIANCE

Thank you for the opportunity to provide testimony on the Animas-La Plata project cost overruns. We will supplement these remarks with more detailed information in the coming weeks.

The recent disclosure that the Animas-La Plata Project is already \$150,000,000 over the original cost estimates is not the real news. The real news is that the BOR knew the estimates to be bogus back in 1999 when they submitted them to Congress. Indeed, these cost estimates were commissioned not by the BOR, but, in a

callous and calculated misuse of the Indian Self-Determination Act, by the Ute tribes,<sup>1</sup> the project's primary contractors and chief beneficiaries.

Moreover, as internal documents show, these estimates underwent little or no governmental review, and were actually devoid of cost estimates for whole portions of the project. Some suspect these rascally "accounting errors" to be deliberate so as to convince the Congress and the public that the project really had been downsized, both in cost and size. Actually, the public costs of the project are much greater than have ever yet been reported, and the project has not really been downsized despite the PR to the contrary.

First the costs: The BOR's policy has been to tailor the truth about the project's overall costs by focusing only on the construction costs, while totally ignoring all other costs, past and future. We ask that there be a true accounting. If done honestly, both the Congress and the public will be agog at the outcome. Here are a few of the hidden costs that need to be accounted for:

- The interest on the public debt that the project will burden us with over the 100-year life of the project needs to be calculated and added as a project cost. The interest component alone will add billions of dollars to the true cost of this project. The taxpayers also have to repay all but a sliver of project construction costs. And those costs, too, for reasons outlined below, will reach well into the billions when all is said and done.
- The construction cost estimates need to include estimated cost increases from inflation. With a modest 3 percent rate of inflation over a 15 to 20 years construction phase present costs estimates might increase by 50 percent from inflation.
- The estimated costs should be calculated based on a range from high to low. Presently, the BOR prefers to give only a low-range cost estimate. They persist in the fanciful notion that their forecasting is precise and unsusceptible to unknowns and human error. Yet, the last three major BOR construction projects, the Dallas Creek and Dolores Projects, both in Colorado, and the Central Arizona Project have all been at least 300 percent over original cost estimates. Recently, the project construction engineer admitted ALP was one of the most complicated projects ever. Cost sensitivity analysis is a must if we are to have any confidence in BOR cost projections, even those they admit to.
- Adding to our concern over the final price tag is the fact that, while hundreds of millions in Federal tax dollars have already been spent on this project, ALP construction is only 3 to 4 percent completed according to a recent admission by the project construction engineer. Even if the project were to experience annual cost overruns of 10 percent annually, rather than last year's 50 percent jump, we are looking at well over another 100 percent increase in public costs, assuming a 15 to 20 years construction period.
- Over \$60,000,000 in planning costs have been shaved off because the BOR has determined they were incurred for the agricultural portion of the project that was supposedly eliminated by the so-called 1999 compromise. These are still part of the project's cost to the public and should be shown as such. Moreover, as we will discuss later, the agricultural portion of this project is still very much alive in the minds of the major backers of the project.
- The Ute tribes received \$60,000,000 in ALP settlement money back in 1987. This money also should be added in as a public cost. Indeed, the Utes were awarded another \$40,000,000 in the 1999 amendments. This money should also be shown as a public cost even though the BOR is asking the BIA to budget for that money so that it does not undercut the money they have to spend on construction and does not show up as a project cost.
- The BOR's 1999 cost estimates failed to account for the power lines and other infrastructure required to bring federally subsidized power to the project pumping plant at Durango. The BOR is presently asking WAPA to request \$10,000,000 in its budget to fund this portion of the project. Once again this is a project cost and should be added in even if it comes disguised in WAPA's budget.
- In 1996, we asked the Department of Interior to calculate the value of lost hydropower and increased salinity from project water diversions. Their estimate

<sup>1</sup>The Southern Ute and Ute Mountain Ute tribes are the chief beneficiaries of ALP, receiving the lion's share of project water free of cost. These two small but very wealthy tribes have a combined population of about 3,000 people, counting man, woman and child. And despite claims made by some in support of building ALP, these tribes are not without water. In fact, they already control about 150,000 acre feet of water, most of it developed with Federal assistance. This constitutes half the water the entire State of Nevada is entitled to under the Colorado River Compact. Approximately 2,000,000 people live in Nevada.

was a public cost of \$18,000,000 annually. Clearly, over the 100-year life of the project those public costs will reach into the billions of dollars. Moreover, the huge power requirements for project pumping will be robbed from present CRSP users. It is not unlikely, therefore, that another coal-fired power plant will be required in the four-corners area to replace the power needed for project pumping and that lost because of project diversions. These costs, too, have not been estimated or acknowledged for what they are, project induced costs to the public.

There are many other costs which remain hidden or half buried, but even the foregoing give ample proof that this project is a bank buster. So, when we add into this putrid mix the fact that there are no known uses for most project water, the burdensome imbecility of this project becomes even more pronounced. In fact, we have been in court for almost 2 years trying to find out the intended uses of project water, for "beneficial use" is a requirement before a water right can be granted under Colorado law. Project proponents have refused to provide any information on use. As a result, the American taxpayer is advancing truck loads of scarce public dollars for a project that doesn't even have a secured water right with which to fill the reservoir.

On top of that, the BOR rushed into the few repayment contracts it has for small amounts of project water knowing that the cost estimates they were basing these contracts on were wrong. They even threatened project backers that if they didn't sign up for water immediately they would have to pay more when the real costs became known. These contractors are now refusing to pay more no matter what the final costs of the project may be. This threat defies Federal reclamation law requiring full repayment of the costs of M&I water, plus interest. It also helps explain why BOR is attempting to have other agencies such as WAPA fund some of the construction outlays.

We mentioned earlier that the agricultural portion of the project is still alive and well. We know this from recent court briefs in which one of the project's chief backers, the Southwest Water Conservation District, is fighting our efforts to have them abandon the agricultural water rights for the Animas-La Plata Project. Despite the 1999 legislation which supposedly eliminated agricultural water from the project, they've declared they intend to use this water for irrigation. Perhaps that explains why project pumps were greatly increased in size in the final design. Now multiple filling of the project reservoir can be easily accomplished so that project backers can have their cake and eat it too. It is Candide!

In summation we make two requests. We ask Congress to suspend funding for this project until an independent GAO audit exposes the real public costs and Congress has an opportunity to evaluate those costs against the purported benefits. We also ask that, if this audit discloses criminal intent to defraud the American taxpayer, as we think it will, Congress join us in asking for a Federal grand jury investigation and prosecution of those responsible.

Finally we note with great approval present efforts to adopt a pay-as-you-go budgetary process in the Senate. This is not only necessary and wise public policy, in our opinion, but one of its minor consequences must surely be the red lining of that mountain of lies known as the Animas-La Plata Project.

Thank you for the opportunity to testify.

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PREPARED STATEMENT OF RUSSELL GEORGE, EXECUTIVE DIRECTOR, DEPARTMENT OF  
NATURAL RESOURCES, STATE OF COLORADO

#### INTRODUCTION

The State of Colorado appreciates this opportunity to provide testimony before the Senate Subcommittee on Energy and Water Development concerning the Animas-La Plata Project (ALP). Construction of the Animas-La Plata Project is extremely important to the State of Colorado as it is the final piece required to bring closure to the resolution of the Tribal reserved water rights claims under the 1986 Colorado Ute Indian Water Rights Final Settlement Agreement, in particular those portions of the Settlement concerning the Animas and La Plata Rivers.

Despite the considerable controversy that has been generated by the Animas-La Plata Project, there exists an extraordinary partnership between the States of Colorado and New Mexico, and the Indian and non-Indian communities in southwestern Colorado and northwestern New Mexico. Together, we have successfully quantified the reserved water right claims of the Southern Ute and Ute Mountain Ute Tribes in Colorado, and implemented most of the Settlement Agreement, in a unique way that serves as a national model. More than that, however, is a genuine sense of

pride that exists between the Indian and non-Indian communities in the area, over shared use and development of water and mineral resources, economic opportunity, and preserving the quality of life and environmental heritage of the area.

Through the 1986 Settlement Agreement, we have avoided protracted, expensive and divisive litigation. We have preserved non-Indian economies and provided for stable development of Tribal economies. We have avoided the social disruption resulting from the enforcement of Tribal reserved right claims. We have integrated the administration of Indian and non-Indian water rights into the State water rights system.

Completion of the Animas-La Plata Project is critical to preserving the benefits of the 1986 Settlement Agreement with the Ute Tribes and the stability that it brings to the citizens of the San Juan River Basin.

Accomplishing these results has required vision, extraordinary leadership, respect for the needs of all sides, a willingness to listen to and explore new solutions, and a commitment to stay at the table until a solution is reached. To fully understand the importance of the Animas-La Plata project in this process, it helps to review the history of the Reservations, the Animas-La Plata Project and the 1986 Settlement Agreement.

#### HISTORICAL CONTEXT

The original Ute Reservation was established by treaty in 1868, prior to the arrival of non-Indian settlers to the area. The arrival of non-Indians resulted in conflicts, and reconfiguration of the Reservation lands. In 1895, Indians living on the Reservation were given the option of settling on 160 acre allotments, or moving to the western portion of the Reservation. Non-Indians were able to acquire some of these allotments as well. In 1934 this homesteading process was closed. The result was the present configuration of checkerboard Indian and non-Indian lands on the Southern Ute Reservation and the contiguous block nature of the Ute Mountain Ute Reservation. These lands are downstream from non-Indian development in Colorado. Almost every river in southwestern Colorado passes through one or both of the Reservations.

The rights of Indian Tribes to reserved water is based on the date of the reservation. In the late 1800's, non-Indian irrigation was beginning upstream from the Reservation, on the Pine River. The Southern Ute Tribe filed claims for irrigation purposes in 1895, and water litigation ensued which lasted until 1930, when a Federal court awarded the Indian claimants the No. 1 water right on the Pine River. This created a severe water shortage for the non-Indian irrigators, and resulted in the construction of Vallecito Dam in 1941, to serve both Indian and non-Indian lands.

In contrast, the Mancos Project was developed on the Mancos River by 1950. Although the Mancos River is the primary river through the Ute Mountain Ute Reservation, the Tribe did not receive the benefit of water service from the Project. In fact, the town of Towaoc, which is on the Ute Mountain Ute Reservation, did not even have a potable water supply until 1990, as part of the implementation of terms under the 1986 Settlement Agreement.

Colorado is a semi-arid State and the precipitation it receives, 16.5 inches on average, varies significantly from year to year. Droughts occur frequently and can last several years. Therefore, the ability to capture and store water during times of plenty is critical to providing a stable economy. In 1956, Congress enacted the Colorado River Storage Project Act (CRSP), which provided for comprehensive water development throughout the Upper Colorado River Basin. This Act authorized the construction of the initial CRSP units—Curecanti, Flaming Gorge, Navajo and Glen Canyon; a number of participating projects, including the Florida Project; and the preparation of planning reports—including the Animas-La Plata and Dolores Projects. The Florida Project was completed to serve lands on Florida Mesa in 1963, which included some Indian lands but which did not completely meet Indian needs.

The CRSP Act also established a mechanism for assisting in the funding of construction of these and other projects, through the creation of the Upper Colorado River Basin Fund (the "Basin Fund"). In short, hydroelectric power revenues generated from the CRSP Units are credited to the Fund to pay for certain construction, operation and maintenance costs of the initial CRSP units. The balance of any revenues are credited to each of the upper basin States to pay for that portion of the construction costs of participating projects allocated to irrigation, that are beyond the ability of irrigators to repay. Additionally, participating projects can take advantage of favorable rates for CRSP power.

In 1968, Congress enacted the Colorado River Basin Project Act (CRBP). Among other things, the CRBP Act authorized the construction of the Animas-La Plata and Dolores Projects, concurrent with the completion of the Central Arizona Project. The

authorization for the Animas-La Plata project was for a configuration substantially different than the presently proposed configuration. However, the Project was always contemplated to serve both Indian and non-Indian needs.

Thus, as of the late 1960's, there was some resolution of Tribal claims, and a good deal of water development undertaken and contemplated in the San Juan River Basin. Some but not all of this development benefited the Tribes. However, quantification of Tribal claims, and their impact on non-Indians, were certainly open questions. The United States Supreme Court established a test for the amount of such claims, based on practicably irrigable acreage, which includes both present and future irrigation needs.

Quantification of the Tribal claims in Colorado commenced in 1972, when the United States Department of Justice filed reserved rights claims on behalf of the two Ute Tribes in Federal district court. The State of Colorado and other parties intervened, and moved to dismiss on the grounds that under the McCarren Amendment jurisdiction belonged in State water court. The United States Supreme Court ruled that State court was the most appropriate forum in which to achieve integrated adjudication of reserved rights claims. Immediately thereafter, the United States filed extensive claims in State water court.

The Tribal claims encompassed the potential irrigation of some 93,000 acres, in over 25 stream systems tributary to the San Juan River. Most of these lands were in the La Plata and Mancos River Basins, which are water-short and over-appropriated. Success by the Tribes would totally eliminate existing non-Indian irrigation, disrupt local economies and create regional hostility.

#### THE 1986 SETTLEMENT AGREEMENT AND SUBSEQUENT LEGISLATION

In April 1985, many parties, public and private, convened negotiations to address the issues raised by the Tribe's reserved rights claims. The State of Colorado's negotiating position was based on several principles:

- vested property rights held by owners of State decreed water rights would not be compromised;
- existing economies should be protected;
- existing uses should be protected by a "no injury" standard;
- reserved rights claims should be quantified by State water court, not by Congress or in Federal courts; and
- the Tribes legitimate needs, such as the lack of a potable water supply for Towaoc, should be met.

After intense and complex negotiations, an agreement in principle was reached that included a binding cost-sharing agreement for construction of the Animas-La Plata Project. This Agreement was titled the "Agreement in Principle Concerning the Colorado Ute Indian Water Rights Settlement and Binding Agreement for Animas-La Plata Project Cost Sharing." By signing the Agreement in Principle, the Secretary of Interior certified that the non-Federal cost share contributions were reasonable, allowing for the Federal release of the first \$1 million for construction of ALP. In addition to the cost sharing elements of the Agreement, the parties to the State water court litigation agreed to a set of principles that established the parameters for settlement of the reserved right claims.

After 6 months of intense negotiations, the Colorado Ute Indian Water Rights Final Settlement Agreement was signed on December 10, 1986. The Settlement Agreement contains six major elements: (1) In each of the drainage basins, the reserved rights of the Tribes were quantified; (2) The Tribes waived ancillary breach of trust claims against the United States; (3) The Tribes agreed to specific conditions concerning the administration and use of reserved water rights, so as to integrate such administration into administration of non-Indian water rights. These conditions included beneficial use as a limiting condition, monitoring of water usage, sharing of streamflow data, and judicial change in use proceedings in Colorado State water court when required. The State court was given jurisdiction over all water on the Reservations not decreed to the tribes as reserved water rights, including both unappropriated water and State appropriative rights. The parties agreed to the entry of consent decrees in State water court; (4) The Tribes received commitments to obtain \$60.5 million in Tribal Development Funds, to enable the development of water and assist in economic self sufficiency; (5) The non-Federal parties agreed to significant cost sharing of the Animas-La Plata Project and Tribal Development Funds. The parties agreed to seek Congressional deferral of Tribal repayment of certain project costs until the water from the projects was actually put to beneficial use; (6) The parties agreed to seek Congressional relief from the Non-Intercourse Act limitations on Congressional oversight over the use of reserved water rights. The Tribes were allowed to sell, exchange or lease water outside the Reservations,

within or outside the State of Colorado, subject to State and Federal law, interstate compacts and the law of the Colorado River.

The Settlement Agreement specified certain contingencies that had to be met before the settlement became final. The parties agreed to submit consent decrees to the Division 7 water court for judicial approval. A stipulation setting forth this commitment was filed, but was subject to legislative enactments by the United States Congress and Colorado legislature prior to becoming final.

Federal legislation was introduced, and was enacted in 1988. The Act approved the settlement and contained all the provisions contemplated by the parties, except for those relating to the interstate marketing of water. The legislation as introduced reflected the neutral nature of the Settlement Agreement concerning the legality of interstate marketing of reserved water rights under the Law of the River. However, Lower Colorado River Basin States adamantly opposed the provision, and demanded that the Tribes be prohibited from applying for any out of State changes in place of use. Other western States objected to the potential alienation of any Federal reserved water right from the Federal reservation. The final Act therefore limited use of Tribal rights in the Colorado River Basin until a final court order or agreement of all seven Colorado River Basin States has previously allowed such right for non-Federal, non-Indian water rights. Moreover, the Act provides that any use of water off Reservation will result in the right being changed to a State of Colorado water right for the term of such use.

The Colorado General Assembly also enacted the legislation contemplated by the Settlement Agreement. This legislation appropriated \$5 million to the Tribal Development Funds, so much as needed for the Towaoc Pipeline, and \$5.6 million for the Ridges Basin cost sharing.

In December 1991, the Water Court approved the consent decrees that had been submitted to it based on the stipulations entered pursuant to the Settlement Agreement, and following the enactment of necessary Federal and State legislation.

#### COLORADO UTE SETTLEMENT ACT AMENDMENTS OF 2000

The debate over construction of the Animas-La Plata Project with environmental opponents did not stop despite the 1988 Agreement and the entry of the water court decrees. A separate process, was undertaken to try to bring final closure to the Tribal claims on the Animas and La Plata Rivers. The culmination of that process was the Amendments of 2000 to the 1988 Settlement Agreement which in short reduced the size of Ridges Basin Reservoir by approximately one-half and restricted the project to municipal, industrial and recreational purposes, eliminating the irrigation component of the project. The amendments also reduced the water allocations to various project beneficiaries and created "resource funds" for the Southern Utes and Ute Mountain Utes.

#### CONCLUSION

In summary, all of the conditions of the Settlement have been satisfied, except for the construction of the Animas-La Plata Project, and the Agreement remains in full effect. Therefore, completion of the Animas-La Plata Project is of the upmost importance to Colorado if it is to avoid litigation with the Ute Tribes over their reserved water rights claims on the Animas and La Plata Rivers. After the extraordinary efforts by all the parties involved in these settlement discussions since 1972, the only responsible action is to complete implementation of the Settlement Agreement by constructing the Animas-La Plata Project.

#### THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT (ISDEAA)

#### PUBLIC LAW 93-638

The ISDEAA is designed to provide meaningful involvement by Tribes in the administration, planning and conduct of Indian programs. The Act requires the Federal Government to contract with Indian Tribes for programs, functions, services and activities that are designed to benefit Indians. The design and construction of ALP has been made subject to the ISDEAA through the Colorado Ute Indian Water Rights Settlement Act of 1988 and we are fully in support of that settlement provision.

With respect to the ISDEAA or the 638 process, the State of Colorado has no experience other than through the Animas-La Plata Project. We understand that a Tribe under ISDEAA is entitled to negotiate reasonable costs for performing the contract, the costs for preparing the proposal, reasonable general administration costs, a reasonable profit, and auditing expenses. The negotiating process provides the tribes access to project cost estimates, in this case those of the U.S. Bureau of

Reclamation, in advance of the negotiations. This process may not result in a project cost as low as what would likely occur through a competitive bid process. Furthermore, it appears difficult to identify what the increased cost of working through ISDEAA would be. Based on information from the Bureau of Reclamation for the Stage 1 work on the Ridges Basin Inlet Conduit and Ridges Basin Dam Outlet Works Excavation, both of which are now complete, the final contract values have exceeded the original contract values. Some of this may actually be a savings due to the inclusion of work that was scheduled for a future phase, but breaking that out requires day-by-day monitoring of the project.

Our main concern is that the ISDEAA or 638 costs, which are non-reimbursable by law, be carefully monitored and not passed on to those that have or potentially could have repayment contracts. Given the cost increases to the Animas-La Plata Project, we desire assurances that the ISDEA or 638 costs do not make the cost of project unaffordable to the end users.

We appreciate the opportunity to comment before the committee today on the importance of the Animas-La Plata Project to Colorado and to the completion of the Ute Water Settlement Agreement.

#### ADDITIONAL COMMITTEE QUESTIONS

[The following questions were not asked at the hearing, but were submitted to the witnesses for response subsequent to the hearing:]

#### QUESTIONS SUBMITTED TO MIKE GRISWOLD

#### QUESTIONS SUBMITTED BY SENATOR PETE V. DOMENICI

#### LEVEL OF INVOLVEMENT BY PAYING PARTNERS

*Question.* Could you please describe your level of involvement in the construction of the project prior to last fall when the report came out, and contrast that with your level of involvement now?

*Answer.* As described in my testimony before the committee, there was ongoing and regular personal involvement between myself and other members of the Board of Directors of the Animas-La Plata Water Conservancy District and our counsel with the Durango field office of the Bureau of Reclamation concerning the construction of the Animas-La Plata Project. We attended every project operations committee meeting and project coordinating committee meeting. In addition, we attended numerous other meetings, both formal and informal with Bureau of Reclamation staff to discuss a wide variety of issues related to the Animas-La Plata Project. These meetings began before 1999 and continued through the issuance of the letter to the Ute Mountain Ute Tribe on July 31, 2003. During these meetings, the Bureau of Reclamation regularly informed us of their intentions but rarely asked us for input whether the topics related to 638 issues, wetland mitigation issues or project construction issues.

If there was one single point of dissatisfaction, which we experienced during this extended process, it was the lack of a “dialogue” between the Bureau of Reclamation staff and the project supporters. Instead of a process of consultation, we were engaged in a process wherein the Bureau of Reclamation reported on their decisions and/or intentions.

From the issuance of the final supplemental and environmental impact statement containing the project cost estimates until the July 2003 letter, there was never any discussion of the cost consequences of the decisions that were being made, despite requests that those discussions occur. In addition, there were never any budgets prepared showing the costs of various alternative solutions to design decisions being made by the Bureau of Reclamation.

In contrast, since the outcry arising from the July 31, 2003 letter to Ute Mountain Ute Tribe, the Bureau officials have been extraordinarily responsive. They have provided, through a series of ongoing meetings, careful and complete analysis of the original 1999 cost estimate, the 2003 reformulation of a cost estimate and the differences. The most important difference to note is not that there has been a significant increase in the amount of time spent, but rather the change in the level of detail provided and the opportunity to discuss decisions at a preliminary level.

The time spent in meetings with Bureau officials has not changed appreciably. The level of interaction with Bureau officials, and in particular the opportunity to interact with the responsible construction official, Mr. Rich Ehat, has increased significantly. Clearly we will continue to have reasons to question proposals made by the Bureau, and we may not always agree with their decisions, but the opportunity

to raise those questions and express those disagreements is clearly now a matter of importance to the Bureau of Reclamation at all levels. It is a welcome change from the perspective of those who will be responsible for paying their reasonable pro rata share of the cost of this project.

*Question.* What improvements would you like to see made?

*Answer.* As described in the preceding response, the Bureau has become very responsive to the project supporters', and upfront repayment participants', concerns. The Bureau of Reclamation has made the changes that procedure should have been in place from the beginning. Despite the embarrassment of responding to the criticism resulting from the range in project cost, we must respectfully respond that it is "better late than never" and we are heartened by our current relationship with the Bureau of Reclamation. There procedures appear to be adequate to permit the input from project sponsors and participants and they are endeavoring to provide whatever information we request or require.

#### REQUIRED OUT YEAR FUNDS

*Question.* Do you feel you have adequate information from the Bureau to insure that you will be able to meet your financial obligations? In other words, do you feel project accounting is such that you have a good handle on where you stand, and where you will end up financially when the project is completed?

*Answer.* The answer to this question is both yes and no. Before describing the reason for such an ambivalent answer, it is necessary to understand the position of the Colorado project sponsors. The non-Indian sponsors of the Animas-La Plata Project made enormous sacrifices in agreeing to the downsized Animas-La Plata Project proposed by former Secretary Babbitt. The significant part of the benefit from the Project to these individuals and organizations was foregone and the remaining demands for M&I water must compete with alternatives on a leased cost basis. Relying upon the Bureau's acceptance of the 1999 cost estimates, the Colorado Water Resources and Power Development Authority paid up front the pro rata share of the project cost based upon a marketing agreement with the Animas-La Plata Water Conservancy District. That marketing agreement contemplated that the City of Durango would acquire approximately 1,900 acre-feet of project consumption and that the Animas-La Plata Water Conservancy District would acquire the remaining 700 acre-feet. Naturally, if the entire 40 percent increase in project costs were determined to be fully reimbursable, the cost of those water supplies so far outweighs other alternatives as to place the project outside of the financial reach of the non-Indians.

The Bureau has been exceedingly forthright in discussing the issue of project costs and the allocation of those costs between the reimbursable and non-reimbursable categories. To the extent that this question requires whether or not the Bureau is providing as much information in as much detail as is reasonably available under the present circumstances, the answer must be "yes." To the extent that the questions seek the project sponsors' confirmation that the Bureau has provided enough hard data to permit the project sponsors to conclude that they will be able to repay their share of project costs when the project is completed, the answer is "no." The inherent uncertainty in projecting the final cost of the project creates this dichotomy.

In order for the Colorado project participants to have confidence that they can meet their financial obligations end up in a position where they can pay for their pro rata share of their project obligations it is necessary to identify and set in stone a maximum financial cost, which they will have to bear. That cost should be based upon the best current available information and reflect all of the costs of the project that are fairly attributable to the provision of municipal and industrial water to non-Indian participants. That allocation of cost must recognize the Indian water rights settlement purposes which currently support the development of this project and which must recognize the fact that the cost of water from the Animas-La Plata Project must be competitive with other reasonable alternatives for project water supply.

Finally, it is important that the cost of water from the Animas-La Plata Project to non-Indian participants be uniform on a per-acre foot of water delivered basis. As the committee considers the consequences of the change in cost of the Animas-La Plata Project, it must also consider the fact that the non-Indian water supplies from the Project ought to be equal among all of the non-Indian participants on an acre-foot for acre-foot delivered basis.

## QUESTIONS SUBMITTED TO L. RANDY KIRKPATRICK

## QUESTIONS SUBMITTED BY SENATOR PETE V. DOMENICI

## BOR CONTRACT OBLIGATIONS

*Question.* Mr. Kirkpatrick, you have touched on your desire for the Bureau to live up to their contract obligations with the San Juan Water Commission. Would you briefly outline for us those areas in which you feel they did not meet these obligations?

*Answer. Contract Obligations.*—The following outlines the Bureau's obligations to the San Juan Water Commission under the Contract, which was agreed upon in late 2001 and signed in 2002, and the areas in which the Bureau did not meet its obligations.

(A) *Failure to consult with the Commission.*—(1) Consultation is required in several contract provisions:

- (a) The definition of consultation is: "Consultation means the United States shall notify and confer with the Commission regarding significant decisions pertaining to this contract. In the event that consensus cannot be reached and the United States makes a decision, appeals are available to the extent allowed under applicable laws. Article 1(j), page 4.
- (b) Under "Project Works" in Article 2, the Contract requires consultation at two places, the introductory paragraph and in Article 2(a)(4).
- (c) Article 4, "Project Coordination Committees," describes the establishment of two committees to provide consultation on project construction issues and, later, on project operation issues.

Article 4(a): "The Project Construction Coordination Committee will be made up of representatives of those entities that have been identified by the Settlement Act, as amended, to receive a water allocation and the Bureau of Reclamation. This committee will provide coordination and consultation on the construction activities among all the Project beneficiaries, seeking common understanding and consensus on decisions associated with such items as final plans for Project Works, Project construction completion schedule, and Project construction costs. Upon Project completion, this committee will be dissolved." (emphasis added)

(2) The BOR failed to meet its obligations to consult.

The BOR notified us of the organization of the required "Project Construction Committee" (PCC) on April 20, 2001, and reported May 22, 2001, on the formation of the PCC. Subsequent to these early meetings, we notified the BOR that the PCC as they organized it was not meeting the requirements of our contract. Then, the BOR established a "Contact Compliance" meeting with us in an attempt to meet the intent of our contract. We tried to use the Contract Compliance meetings to obtain essential information, but with little success. We asked the questions and engaged consultants familiar with the BOR, but we were not provided useable information. We had realized early on that the costs being reported to us were inconsistent with the interim cost estimate in the 2000 FSEIS. Also evident in the PCC meetings were the lack of common understanding and any engagement of the sponsors to reach a consensus about decisions the BOR was facing. At the meetings, the BOR was simply informing us of some of the decisions it had made, without consultation with us.

(B) *Non-contract cost overruns.*—The BOR has failed to maintain non-contract costs at or below 30 percent, as it said it would try to do in Article 8(i). Also, we had not been afforded an annual report specifying the dollar amount of the non-contract and all other construction cost in a timely manner.

(C) *The BOR fails to support cost allocation for operations as specified in the Contract.*—The BOR has not supported the use of facilities procedure as the methodology to use to allocate the costs of operations, as clearly called for in our contract. Article 11(a). This dispute has been central to the delay in developing the Project Operations Committee so that it may function to develop and operations plan.

(D) *The Bureau has not assured the Commission that it can deliver the full Statutory Water Allocation under all scenarios.*—Our Contract states:

"Sufficient water will be delivered from Project storage or bypassed to ensure that the Commission annually receives its Statutory Water Allocation to be available for diversion at all approved points of diversion on the San Juan River." Article 5(a).

Based upon information and discussion prior to our execution of our Contract, we were assured that 3,025 acre feet of storage would be sufficient to assure our water supply, and that in fact that this was a conservative position. Again, subsequent re-

view resulted in a discovery that, in fact, the adequacy of this amount of storage depended on a model of operations that was not consistent with the ROD, and laws governing the water. In particular, the model assumed that the Commission and Navajo Nation would have first call on water in the river, and that the Ute Tribes and the State of Colorado would take all of their water from the Reservoir.

Consequently, if the two Ute Tribes, La Plata Conservancy District (NM), and the State of Colorado chose to obtain their Statutory Water Allocation from direct flows in the Animas, as allowed in the ROD, our storage would be inadequate almost directly proportional to the amount used from the River. The BOR cannot assure us now that we will be able to receive our full Statutory Water Allocation if the tribes or others choose to use the Animas River to deliver water instead of the reservoir.

*(E) Poor forecasting of money required results in advances that are too big.*—Our Contract requires that we advance only the actual money spent on construction in a given quarter, but the Bureau has never provided an estimate that even closely approximated the actual construction amount. Each Bureau request has exceeded the actual construction expenditures by as much as \$400,000 per quarter. The Bureau's overestimates are costing us significant interest income, which we depend upon to cover inflation and other associated cost increases.

*Question.* In your opinion, has the Bureau done anything to rectify this problem?  
*Answer. Effort to rectify problems.*—In our opinion, the Bureau has made an effort to rectify the problems, but the Bureau has not reached the level of consultation for decision-making that we understand is required in our Contract. We are provided information in a more timely manner, but at this late stage of design and active construction, most discretionary actions have occurred with little chance of modification. Further, the Bureau recently informed us that it has determined that all actions it has taken are necessary and reasonable, by their definition, which we had no say in developing. The PCC process is more open, with significantly improved reporting. We are definitely progressing, but we are short of success.

#### LEVEL OF INVOLVEMENT BY PAYING PARTNERS

*Question.* Mr. Kirkpatrick, could you please describe your level of involvement in the construction of the project prior to last fall when the report came out, and contrast that with your level of involvement now?

*Answer.* Our level of involvement prior to July 31, 2003 was significant, but it was met with resistance by BOR staff in the Durango Office and the Western Colorado Area Office. They were courteous and seemed to meet with us on each request, but they seemed intent on saying that understanding the system of the BOR was our responsibility, it was not their responsibility to modify their reporting to make it track with the estimates we had. We engaged the services of a former Deputy Commissioner in an effort to understand the Bureau's reports, and he had difficulty tracking construction and cost as we received the information. It was easily consuming more than 50 percent of my time.

*Question.* What improvements would you like to see made?

*Answer.* Currently, it is a pleasure to say the current construction engineer has diligently sought to improve communications, and provide updates on ongoing activities. The problem we now face is catch-up on agreements made that we were not informed of, much less adequately consulted with, prior to July 31, 2003. On a regular basis we visit the site, and we are briefed on the progress, including identified challenges. The only shortcoming is a shortage of realistic alternatives. It is now consuming about 70 percent of my time.

#### REQUIRED OUT YEAR FUNDS

*Question.* Mr. Kirkpatrick, do you feel you have adequate information from the Bureau to ensure that you will be able to meet your financial obligations? In other words, do you feel project accounting is such that you have a good handle on where you stand, and where you will end up financially when the project is complete?

*Answer.* We are continually seeking, through a series of discussions, to get a handle on the ability to meet our financial obligation. We have been given a variety of answers to the question, "What is the impact of extending the construction schedule?" The answers seem to change frequently. Current accounting has improved exponentially from what it was prior to July 31, but it still is not at an acceptable level regarding outyears. We understand that for fiscal year 2006 and 2007, at least \$70 million will be needed each year to keep the project on schedule. We would appreciate a question from the committee to the Bureau to confirm the level of funding it needs to construct the project most efficiently.

We are extremely concerned the cost of the project will exceed our ability to pay, and thereby diminish or deny the benefits of the project to our citizens. It seems

that we should be able to determine the cost definitively now through a cap on our obligation and encourage the continued efficiency we see applied today in the project.

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QUESTION SUBMITTED TO THE UTE MOUNTAIN UTE TRIBAL COUNCIL

QUESTION SUBMITTED BY SENATOR PETE V. DOMENICI

638 PROCESS

*Question.* We have talked about the theory behind the 638 process . . . that it is intended to provide the opportunity for Native Americans to “fill the shoes of Federal employees.”

In your opinion, is this the way 638 is working on this project? In other words, do you feel that there is unnecessary duplication of effort?

Answer. [The witness failed to respond by the time of publication.]

CONCLUSION OF HEARING

Senator DOMENICI. Okay. Thank you all very much. No other questions. We stand in recess.

[Whereupon, at 11:25 a.m., Wednesday, March 24, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

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